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CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

JAMES M. SEIBERT,
Collector of Cape Girardeau County, Missouri,
Plaintiff in Error,
vs.
THE UNITED STATES *ex rel.* GEORGE W. HARSHMAN,
Defendant in Error.

No. 1103.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

MOTION TO DISMISS WRIT OF ERROR.

MOTION TO AFFIRM, WITH DAMAGES.

STATEMENT AND BRIEF BY DEFENDANT IN ERROR.

FISHER & ROWELL,
for Defendant in Error.

Pierce Bros., Law Brief Printers, 118 N. Third Street, St. Louis, Mo.

SUPREME COURT OF THE UNITED STATES.

JAMES M. SEIBERT,
Plaintiff in Error,
vs.
THE UNITED STATES *ex rel.* GEORGE W. HARSHMAN,
Defendant in Error.

MOTION TO DISMISS WRIT OF ERROR.

And now comes the defendant in error and moves the court to dismiss the writ of error in this case for the following reasons:

1. Because the amount in controversy in this case is less than five thousand dollars.

2. Because the bond taken in this case was not sufficient in amount to answer for all damages and costs if the plaintiff in error fails to maintain his writ of error.

MOTION TO AFFIRM.

And now comes the defendant in error and moves the court to affirm the judgment rendered in the court below in this case, and award the damages to the plaintiff in error for the delays, with costs, for the following reasons:

1. Because it appears on the record that the writ of error was taken for delay only.

2. Because it affirms that there is ground for the dismissal of said writ of error, and that the same was taken out for delay only.

3. Because the plaintiff in error interposed no defence in the court below.

STATEMENT.

The defendant in error has caused the record in this case to be printed in full under the rule of court, the same as if on final hearing, that the court may have in full before it the points relied upon for a dismissal of the writ of error.

It appears from the printed record (page 3), that the defendant in error obtained a judgment in the court below for the sum of $4,391.24, on the 16th day of February, 1882, against the county of Cape Girardeau, Missouri, for interest coupons due upon bonds issued by said county under the laws of said State in behalf of Cape Girardeau township, in said county; that on the 25th day of September, 1882, an alternative writ of mandamus was issued by that court, commanding the county court of said county to levy a tax to pay said judgment on all property made taxable by law; that May 4, 1883, the said court issued a peremptory mandamus for said court to levy a tax to pay said judgment. It appears also that at the May Term of the county court for the year 1883, said court did levy a tax to pay said judgment, and that it made due return thereof to the court below at the September Term, 1883, that said tax had been levied.

It appears further that the plaintiff in error failed to proceed to collect said tax, and at the September Term, 1884, the defendant in error applied to the court below for an alternative writ of mandamus requiring the plaintiff in error as collector of taxes of said court to proceed to make collection of said tax heretofore levied by said county court in the manner prescribed by law for the payment of said judgment, or show cause why he should not do so.

The court issued an alternative writ in which was recited the facts (5) set forth in the petition, the judgment and mandamus upon the same, the levy of the tax and the delivery of the tax books to said collector, that the collector thereof had been enjoined by the State court, the refusal

of the plaintiff in error to proceed further, and it made the usual order to proceed to collect said tax, notwithstanding said injunction, or show cause why he should not do so.

To this writ the plaintiff in error made return (7), admitting that he was collector, the judgment and the writ of mandamus. The return further stated that the "county court did, at its May Term, 1883, order to be levied a tax to pay said judgment together with other judgments of a similar nature;" that he entered upon the collection thereof when he was enjoined by the Circuit Court of Cape Girardeau County, Missouri (7).

The return sets forth in detail the injunction proceedings which were on the relation of the prosecuting attorney of the county, the ground of which was that the county court had not, previous to levying the tax, submitted the matter to the Circuit Court of the county under the provision of an act declared null and void by this court in United States v. Ralls Co., 105 U. S. 732, being sections 6798-99 of the General Statutes of Missouri, known as the "Cottey Bill." That he opposed and defended said injunction suit and it was made perpetual (12) on the ground of non-compliance with the aforesaid unconstitutional law.

The return further says that he is willing to perform his duties as collector, but submits to the court below whether he ought to be compelled to collect said tax by reason of said law. (13.)

This is in substance the return of the plaintiff in error. He does not say he has any reason for not collecting, but asks the court if he ought to do it.

The defendant in error demurred to the return on the ground of its insufficiency (13), which was sustained by the court and judgment rendered thereon, "commanding (14) "him to forthwith make collection of the tax heretofore "levied by the county court of said county, to pay the "judgment heretofore rendered in favor of said relator "and against said county."

The writ of error was then sued out, and bond given for $500. (15.)

BRIEF.

We submit that the writ of error should be dismissed in this case, because the amount in controversy is less than $5,000. The defendant in error sued and obtained judgment for $4,300. He proceeded by himself to collect his judgment and has in no way been connected with other judgment creditors. The collector failed to collect the tax levied, and he proceeded against him on his judgment. The collector makes return that he is willing to collect the tax, but submits whether he ought to be compelled to do so because of an act passed by the Legislature of Missouri in 1879, to baffle such collections long after the issue of the bonds. He refers to an injunction in the state court, but does not urge that as a reason why he should not collect. He states also that the county court, in levying the tax, united with the levy enough to pay other judgments; but this defendant in error had nothing to do with in any way. The judgment on the demurrer was that the collector proceed to collect the tax to pay relator's judgment, not the whole tax. He makes no claim that he cannot collect one without the others. It seems to us that this final judgment of the court is what the plaintiff in error has complained of as error, and this unquestionably is what is involved in this case.

This case is essentially different from the case of Davis v. Corbin, 112 U. S., 36 and 113 U. S., 687, and comes within the rule laid down in that case when the writ of error will be dismissed.

After the judgments were recovered in that case, and the several writs of mandamus were issued "by consent "of relators, and by and with consent of the Circuit "Court, it was agreed, that if the County Court * * "would levy a tax of ten mills upon the property of said "county and collect the same—said tax to be distributed "*pro rata* among the judgments so recovered by the re-

Supreme Court of the United States.

OCTOBER TERM, 1888.

JAMES M. SEIBERT, COLLECTOR, OF CAPE GIRARDEAU COUNTY, MISSOURI,

Plaintiff in Error,

vs.

UNITED STATES EX. REL. GEORGE W. HARSHMAN,

Defendant in Error.

No. 130.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

STATEMENT AND BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

This was a proceeding by *mandamus* in the Circuit Court of the United States for the Eastern District of Missouri.

The alternative writ recites that the relator obtained a judgment in that court February 16th, 1882, against said

county of Cape Girardeau for the sum of $4,391.24 and costs: that said judgment being unpaid said court issued a peremptory writ of *mandamus* to the judges of said county court commending them to levy a tax upon all property made taxable by law in Cape Girardeau township of said county to pay said judgment and that in obedience to said *mandamus* the said county court did cause to be levied a tax to pay said judgment with other judgments of a similar nature May 23d, 1883: that James M. Seibert the lawfully authorized collector was proceeding to collect said tax when an injunction was issued against him by the Circuit Court of the 10th Judicial District of Missouri and that he thereafter ceased from collecting said tax.

To the alternate writ the respondent, Seibert made return admitting the allegations of the writ and setting up in detail the proceedings of the aforesaid injunction. The return admits that the peremptory writ was issued May 4th, 1883. (By a clerical error the alternative writ states it was in May, 1884.)

The petition in said injunction, as detailed in the return, filed in the name of the State of Missouri, by the prosecuting attorney of said county, prays for an injunction against the collection of the tax, on the ground that it was not a State tax, nor a tax necessary to pay the funded or bonded indebtedness of the State, nor a tax for current county expenses or schools, and that said county, before making the levy and order as aforesaid, did not make or cause to be made an application to the Circuit Court of said county, nor to the judge thereof in vacation, for an order to have assessed, levied or collected said two per cent tax, nor was any such order in fact made by such Court, or the judge thereof in vacation: that on the contrary, said County Court, in violation of the statutes in such cases made and provided, and in the usurpation of their power, they, assessed and levied, and are now trying to have collected, said two per cent tax at its assessed valuation of all taxable property of said township, without said permission or order of said

Court, in violation of their duties, and without authority of law, and further that the levy of the two per cent tax was made for the purpose of paying off a portion of a bonded debt contracted in behalf of Cape Girardeau township by virtue of the act of the General Assembly of the State of Missouri approved March 23d, 1868, in aid of all railroads, and it is in violation of that act because levied on the personal property within said township as well as on the real estate therein.

The return further sets out that the injunction as prayed was granted, and the respondent says that in obedience to the said writ of injunction, he has ceased to collect or to endeavor to collect said special tax, the said injunction being still in force.

The respondent in his return further states "that he is ready and willing to do and perform every duty devolved upon him as collector as aforesaid, so far as he legally may, but submits whether he ought to be required to collect the said special tax so as aforesaid levied by the said County Court of Cape Girardeau County, because, as he is informed by counsel, the same was not levied in the mode and manner required by the laws of the State of Missouri, as set forth in sections 6798 and 6799 of the Revised Statutes, concerning the assessment and collection of the revenue, and it is made a criminal offense, punishable by fine of not less than five hundred dollars and forfeiture of office, for any officer in the State of Missouri to collect, or attempt to collect, any tax or taxes other than those specified and enumerated in section 6798 of the Revised Statutes of Missouri without being ordered so to do by the circuit court of the county, or the judge thereof in vacation, in the manner provided and directed in section 6799 of said Revised Statutes. And respondent submits that the said special tax is not a tax specified and enumerated in section 6798 of the Revised Statutes of Missouri, and that no order was made by the circuit court of Cape Girardeau county directing the said county court

to have assessed, levied, and collected such special tax as required by section 6799 of the Revised Statutes of Missouri, and that he is informed by counsel that the said levy of such special tax so as aforesaid made by said county court is illegal and void, and that respondent cannot collect, or attempt to collect, the same without violating the criminal laws of the State of Missouri."

To this return the relator demurred generally. The demurrer was sustained, and a peremptory writ ordered to issue, and thereupon the respondent sued out the present writ of error.

POINTS AND AUTHORITIES.

This case is precisely like that decided by this court in Seibert, Collector, &c., against United States ex rel. of Lewis, 122 U. S. 284.

The proceeding by *mandamus* in the court below was precisely like the one in that case, and was to enforce the collection of a part of the tax levied by the county court of Cape Girardeau County, May 23d, 1883, as in that case. The relator's judgment was obtained in February, 1882, and his peremptory *mandamus* in May, 1883, thus bringing it within the same dates as in that case. By a mistake in figures the date of the original peremptory writ as stated in the petition in this case and in the alternative writ is May 4th, 1884, and it will be seen from the other recitals and from the admissions of the return to the alternative writ in this case that the true date is May 4th, 1883. (See printed Record, p. 7.)

It will thus be seen that this case comes fully within that case, and in fact the return of respondent Seibert is in the precise words except as to names and amounts and was made at the same time.

The points involved in that case were,—

First. Whether the statutes of 1879, giving a different method for assessing taxes, by means of an application to the Circuit Court, was applicable to relator's judgment, or whether he was entitled to the remedy allowed by statute when the bonds were issued. On this point this court held in favor of the original method and it applies fully in this case, being upon the same bonds issued under the same statute.

Second. The contention was made that it was wrong to levy the tax upon personal property and merchants'

licenses, because that kind of a levy was only authorized by an amendment passed March 10th, 1871, which amendment had been repealed by an act of the Legislature of Missouri approved March 24th, 1885.

On this point the court held that relator's rights had become vested by his judgment and peremptory *mandamus* establishing his claim before the date of the repealing act.

The judgment, peremptory *mandamus* and levy of the tax were, in the case at bar, all before 1885, and bring this case fully within the law of that decision.

It is respectfully submitted that this case should be affirmed with costs.

For Defendant in Error.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1859.

No. [illegible]

WILLIAM G. GALLAGHER, APPELLANT,

vs.

THOMAS R. JONES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 6, 1859.

licenses, because that kind of a levy was only authorized by an amendment passed March 10th, 1871, which amendment had been repealed by an act of the Legislature of Missouri approved March 24th, 1885.

On this point the court held that relator's rights had become vested by his judgment and peremptory *mandamus* establishing his claim before the date of the repealing act.

The judgment, peremptory *mandamus* and levy of the tax were, in the case at bar, all before 1885, and bring this case fully within the law of that decision.

It is respectfully submitted that this case should be affirmed with costs.

For Defendant in Error.

127-190

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. ~~1023.~~ 645 ~~340~~ 75

WILLIAM G. GALIGHER, APPELLANT,

vs.

THOMAS R. JONES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH

FILED OCTOBER 6, 1885.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 1023.

WILLIAM G. GALIGHER, APPELLANT,

vs.

THOMAS R. JONES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

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a *Transcript.*

Supreme Court, Territory of Utah.

THOMAS R. JONES, Plaintiff, *vs.* WM. G. GALIGHER, Defendant.

Sutherland & McBride, defendant's attorneys.
Bennett & Harkness, attorneys for plaintiff.

1 *Amended Complaint.*

District Court, Third Judicial District, Territory of Utah, Salt Lake County.

THOMAS R. JONES, Plaintiff, *vs.* WM. G. GALIGHER, Defendant.

The plaintiff complains of the defendant and alleges:

That between the 15th day of January, 1877, and the 15th day of January, 1879, the plaintiff, as a stock broker, at the special instance and request of the defendant, paid and advanced on an open account, current, to and for the use of the defendant, divers sums of money, and also earned at defendant's request, and became entitled to divers commissions as a broker, for all of which monthly accounts were rendered and balances struck, and, by agreement, interest charged monthly on balances; and that on the 1st day of March, 1879, there was due and unpaid from defendant to plaintiff the sum of $6,232.30, no part of which has been paid. Whereupon plaintiff de-
2 mands a judgment against the defendant for $6,232.30, and interest from March 1, 1879, and costs.

BENNETT, HARKNESS & KIRKPATRICK,
Plaintiff's Attorneys.

Dated Nov. 2, 1882.
Filed Nov. 11, 1882.

The original complaint was filed January 16, 1879, and set forth an indebtedness of $5,000, and the answer filed on 8th April, 1879. On the hearing before the referee an amendment was made to that part of the answer relating to challenge stock, and the figures near the close of the answer were changed from $5,000 to $6,232.30, and the answer as amended is as follows:

Answer as Amended.

(Title of Court and Cause.)

Now comes the above-named defendant and for answer to the complaint of the plaintiff herein filed:

Denies that on the account set forth, or any account for moneys advanced or loaned the defendant on the 15th day of January, 1879, or at any time, there was due or owing to the plaintiff the sum stated, or any sum, or that there is now due or owing from defendant to plaintiff on the cause alleged, or any cause, the sum stated, or any sum, or that the defendant ever promised or agreed to pay the same, or any part thereof, or that so to do he, defendant, has neglected, failed or refused as alleged, or otherwise.

And for his further defense in this behalf, the defendant alleges: That the plaintiff is a banker doing business at Salt Lake City, Utah Territory, and has been for about two years past; that this defendant had, during said time, and still has an account with said plaintiff, as such, and that about the month of September, and prior thereto, the plaintiff, at the defendant's request, and as his agent, bought or caused to be bought at the Mining Stock Exchange
3 Board, in San Francisco, California, certain mining stocks, for and on account of this defendant, and at various times thereafter in the years 1877 and 1878, on the order and at the direction of this defendant, and as his agent aforesaid, bought and sold mining and other stocks up to about the date of the complaint; that at divers times during and between the dates above specified this defendant paid into said plaintiff's bank sums of money on account of said purchases, and to the credit thereof, and which was so applied by plaintiff on defendant's order.

And defendant denies that at the date of the complaint the sum of five thousand dollars, or any sum, was due the plaintiff on said account, or on any account, for loans or advances from plaintiff to defendant. Defendant further alleges that it was distinctly agreed between the plaintiff and this defendant in the business that said purchases of stock by the plaintiff were made on defendant's credit, and that said stocks were bought and were to be held subject to defendant's order at all times, this defendant agreeing to pay said plaintiff commissions for his services as agent and an agreed rate of interest on any advances he might make and at no time had the plaintiff any authority to either buy or sell stocks on defendant's account, except by his order.

That sales of stock were frequently made by the plaintiff on the defendant's account and purchases made, and at the defendant's directions sums realized from sales were placed to his credit on his account, or investments made therefrom in other stocks, as defendant gave orders; all of which was in pursuance of the agreement and understanding between the parties aforesaid.

That in the fall of 1878, this defendant, with a view to operating intelligently in the business of dealing in mining stocks, left Salt Lake City, his residence, and went to Virginia City, where the mines whose stocks were being generally dealt in by him were situated, leaving in the hands of said plaintiff as his agent, among other mining stocks, 320 shares of what is known as "Justice" stock, worth $9.00 per share; 50 shares of what is known as "Alta" stock, worth $8.00 per share; 200 shares of what is known as "Tip Top"
4 stock, worth $1.60 per share, the last named being stock in a mine situated in the Territory of Arizona.

That after visiting the mines first named, situated in and about said Virginia City, this defendant became satisfied that it would be a profitable thing to do to sell the stocks above enumerated, then held by him, and invest the proceeds in a certain mining stock then upon the same board as the stocks aforesaid, known and called "North Bonanza;" that in pursuance of his purpose so to do on the 13th day of November, 1878, he ordered the plaintiff by telegraphic dispatch,

which was by him duly received, to sell said first-named stocks and invest the proceeds in said "North Bonanza" stock; that his dispatch was in ample time to make the transaction in the market on that day, and defendant relied upon its being done, and agreed with another party to sell the stock he had ordered purchased; that said plaintiff received said order and acknowledged the same, but refused to buy it and did not give defendant any notice of his failure or refusal till several days after, and then by letter.

That afterwards, and without any orders so to do, and after the stock so sold had become depressed in value, the said plaintiff sold the defendant's "Alta" stock at $7.75 per share, "Justice" stock at $4.40 per share, and "Tip Top" at $1.25 per share, making in all a net loss to defendant on such sales of $1,200 from the prices they would have realized if sold according to defendant's order; that on the date aforesaid, November 13th, the said "North Bonanza" stock was worth not more than $2 per share, and that within five days thereafter, and before plaintiff sold said other stocks, it advanced to and sold for $5.60 per share, and defendant had made an agreement to sell the stock he had ordered plaintiff to buy at such rate that he would have realized thereon the sum of $6,125 if the plaintiff had complied with his order as he was bound to do, all of which sum was lost to defendant by said failure and refusal of plaintiff.

For a further defense this defendant alleges that the plaintiff held for this defendant in November, 1878, in the dealing aforesaid, 600 shares of mining stocks known as "Challenge" stock; that the same was held by said plaintiff as this defendant's agent; that on the 27th and 29th days of November, 1878, said plaintiff, without this defendant's consent, sold and disposed of the same for his own use to the damage of this defendant of twenty-eight hundred and fifty dollars.

The defendant further states that on the 22d day of November, 1877, the plaintiff held for the defendant, as his agent aforesaid, 50 shares of the mining stock known and called the "Ophir" stock, worth at that date $37.50 per share, and on that day pretended to him he sold said stock in defendant's account, and so reported to defendant, when in truth and in fact the said plaintiff had not sold said stock, as defendant alleges on information and belief, but continued to hold the same; that afterwards said stock advanced in value to about the sum of $100 per share, and was sold by plaintiff without any order therefor, to all of which advance, amounting to the sum of about $3,125, this defendant is entitled and claims herein as a credit in his account with plaintiff.

The defendant admits that, independent of the several sums claimed by him above, he would have been indebted to plaintiff in about the sum claimed in the complaint, and alleges that he has a counter-claim in the amount of said several sums as herein set forth against said plaintiff and he prays that the same may be set off against said pretended claims as follows: For losses on stock which plaintiff refused to sell on defendant's order, and which were afterwards sold without orders, as herein stated, $1,200; for losses on stock of the "North Bonanza," which plaintiff refused to purchase

on order, $6,125; for advances in the market price of stocks which plaintiff reported sold, when in fact he had not sold the same and held them until afterwards and sold without orders as above stated, $5,675; in all $13,000, which sum defendant here claims to
6 set off against the said sum claimed by plaintiff of $6,232.30, and claims and prays judgment against the said plaintiff for the balance, $8,000, and for his costs.

SUTHERLAND & McBRIDE,
Defendant's Attorneys.

(Duly verified.)
Served and filed Nov. 3, '82.

Title of Court and Cause.

The undersigned, by order of this court appointed a referee to hear and determine this action and the issues therein, having duly considered the allegations and proofs of the parties and having heard Robt. Harkness, Esq., for the plaintiff, and J. G. Sutherland, Esq., for the defendant, reports the court as follows:

A trial of this action was held in the above-entitled court in October, 1880, which resulted in a verdict and judgment in favor of the defendant for the sum of $5,412.50. The plaintiff having taken an appeal to the supreme court of the Territory from said judgment and from the order denying a new trial, said judgment was on the 1st of September, 1881, reversed and the case remanded for a new trial. On the 3rd day of November, 1882, said cause came on to be heard before the undersigned as said referee, Robt. Harkness, Esq., apppearing for the plaintiff, and J. G. Sutherland, Esq., appearing for the defendant; whereupon by consent of parties the plaintiff filed an amended complaint, and the defendant filed an amendment to his answer, whereupon the attorneys for the respective parties agreed that the evidence taken on the former trial and contained in the transcript on said appeal (a copy of which said transcript is hereto annexed and marked Exhibit A), together with the quotations of the market price of Challenge mining stock, mentioned in the answer for the month of December, 1878, and the months January, February, and March, 1879, as reported in the "Daily Stock Report" of December 22nd, 1879, should be taken and considered as all the evidence in the cause on the hearing before the undersigned.
7 That according to said quotations in said "Daily Stock Report" the highest and lowest market prices of said Challenge stock during each of said months was as follows, to wit: During December, 1878, $2.00 highest and $0.90 lowest; during January, 1879, $3.10 highest and $1.50 lowest; during February, 1879, $5.50 highest and $2.90 lowest; during March, 1879, $3.75 highest, $2.05 lowest.

By his said amended complaint plaintiff demands judgment against defendant for the sum of $6,232.30, with interest thereon from March 1st, 1879, which same defendant in said amended answer admits would be due from defendant to plaintiff, as in said complaint alleged, were it not for the counter-claims set up in said answer.

I find as conclusions of fact:

First. That during all the time when the account mentioned in the complaint was running the plaintiff was a banker, doing business as such at Salt Lake City, Utah.

Second. That during the years 1878 and 1879 plaintiff bought and sold mining stock for defendant upon defendant's order and request; that the stocks so bought for defendant were purchased with plaintiff's own money. That plaintiff was to receive from defendant certain commissions on purchases and sales so made by him, and to receive from defendant interest on advances made.

Third. That there was an implied agreement between plaintiff and defendant that plaintiff should hold the stocks so purchased by him for defendant as collateral security for all moneys due him from defendant for such advances, commissions, and interest.

Fourth. That all stocks purchased were purchased by plaintiff in his own name, and title taken in his own name.

Fifth. That on the 13th day of November, 1878, plaintiff held of stocks so purchased for defendant the following among others, to wit: 320 shares of Justice stock, then worth $9.00 per share; 50 shares of Alta stock, then worth $18.00 per share, and 200 shares of Tip Top stock, then worth $1.60 per share.

8 Sixth. That on said 13th day of November, the defendant being then at Virginia City, Nevada, ordered plaintiff by telegram to turn his, defendant's, Tip Top, Justice, and Alta, without limit, into North Bonanza, at limit of $2.75.

Seventh. That plaintiff received said telegram at Salt Lake City on the same day, and in time to have sold the stocks therein directed to be sold, and to have purchased the North Bonanza that day.

Eighth. That on said 13th of November North Bonanza stock was selling in the market for $2.00 and $2.50 per share.

Ninth. That defendant at the time said telegram was received by plaintiff was largely indebted to plaintiff, more than $4,000 for advances, commissions, and interest over and above the market value of all stocks then held by plaintiff for defendant.

Tenth. That plaintiff failed and refused to obey the directions given in said telegram.

Eleventh. That he failed to notify defendant of his refusal, by telegram, until the 15th of November, 1878, but by letter, written on the 13th, notified defendant of his refusal, which letter defendant received at Virginia City about noon on the 15th.

Twelfth. Within a few days the price of North Bonanza advanced to $5.00 and $5.50 per share, it had reached $3.50 on the 16th of November, 1878, and before the 23d of the same month it had receded to a point below, which it could have been purchased for on the 13th, since when it has fluctuated between 25 cts. and $1.25 per share.

The foregoing are all the material facts reflecting upon defendant's right to damages set up in the first counter-claim in his said answer, to wit, his claim to damages based upon plaintiff's refusal to obey the said telegram. (With reference to this counter-claim the amended answer follows the original.)

The law applicable to these facts and the rights of the parties thereon were settled, I take it, by the decision of the supreme court on said appeal.

In discussing this item of the counter-claim the court says: "Was the plaintiff under obligation to sell the stock and invest
9 the proceeds of such sale as directed by the defendant?" * * * * "This order in effect directed the plaintiff to dispose of certain securities held by him and to take another in place of them." I do not, in the examination of the record and testimony, find any contract or understanding between the parties requiring the plaintiff to do it. The order to sell and reinvest being one, the plaintiff was not obliged to comply with it. The difference between the values of the stocks at the time the order was made and at the time they were afterwards sold is immaterial in this action. The right of the plaintiff to sell at the time of sale and the good faith and sound discretion in which it was made are not in issue. I am, therefore, of the opinion that the verdict allowing damages for the failure of plaintiff to sell the Justice, Alta, and Tip Top mining stocks, as directed by the defendant on November 13th, 1878, is not supported by evidence rightly before the jury, and that there was error in admitting evidence as to the value of the stock of the North Bonanza in support of the item of counter-claim, based upon the *the* failure of the plaintiff to comply with the order to purchase."

Defendant's counsel urges that, admitting plaintiff was under no obligation to obey the order of the 13th, yet it was his duty to notify defendant promptly by telegram of his refusal, so that the defendant might have purchased the North Bonanza himself, and realize the profits of the subsequent advance in the price of the stock; that having failed in this duty, he would be liable to defendant in damages for the difference between the price which defendant might thereafter have realized on a sale of it. It is said this view of the case was not presented or passed upon by the supreme court, and the referee is not therefore precluded from adopting it by anything in the decision on appeal.

It seems to me clear that this question was in the record, and therefore before the court on appeal, and settled by the decision thereon. On the former trial plaintiff objected to all evidence in regard to North Bonanza and the advance in value thereof after the
10 13th of November, 1878, on the ground that there was no obligation on plaintiff to buy it in obedience to the telegram of the 13th. This objection was overruled. The objection was properly overruled if the evidence was admissible for any purpose in the case. Evidence of the advance in the price of this stock was admissible if it were plaintiff's duty to notify defendant of his refusal to act on the telegram of the 13th, and if he would be liable in damages as claimed by defendant; now, by reason of such failure, yet the supreme court say: There was error in admitting evidence as to the value of the stock of the North Bonanza. This becomes the law of the case; therefore I find, as a conclusion of law, that defendant is not entitled to any damages on the item of counter-

claim, based upon plaintiff's refusal to sell Justice, Alta, and Tip Top and turn the proceeds into North Bonanza.

With respect to the second item of counter-claim set up in said amended answer, to wit, the alleged wrongful sale by plaintiff of 600 shares of Challenge stock held by plaintiff for defendant, I find the following conclusions of fact and law:

First. As conclusions of fact I find that on the 27th of November, 1878, plaintiff held for defendant 600 shares of Challenge mining stock; that said stock was purchased and held by plaintiff as set out in the 2d, 3d, and 4th conclusions of fact hereinbefore stated.

Second. That on the 27th and 29th days of November, plaintiff, without any order from defendant so to do, without defendant's consent, and without any notice first given to defendant, sold all said stock for $1.25 per share, and gave defendant credit in account for the sum realized from such sale.

Third. That defendant had no notice of such sale until some time in the month of December, 1878.

Fourth. That at the time of such sale and at the time defendant received notice thereof, he, defendant, was indebted to plaintiff in a sum more than sufficient to have purchased said stock at any price it afterward reached in the market; that on said 27th day of November plaintiff held said stock as collateral security for such indebtedness.

Fifth. That said defendant did not have said stocks purchased by plaintiff as an investment, but his (defendant's) object was to have the chance of realizing profit by the sale of them.

11

Sixth. That the highest price said stock reached in the market in December, 1878, was $2.00, lowest 90c. The highest in January, 1879, was $3.10, lowest $1.50. The highest price in February, 1879, was $5.50, lowest $2.90. The highest price in March, 1879, was $3.75, lowest $2.05.

As conclusions of law I find that if defendant, upon becoming informed of the sale of said stocks by plaintiff, desired further to prosecute the venture and take the chances of a future market, he could have disapproved the sale and required plaintiff to replace the stock, and if plaintiff failed to do so he, defendant, had the right to do so himself and to charge plaintiff with the loss, reasonably sustained in doing so. Therefore defendant is entitled as damages on this counter-claim to a sum equal to the difference between what said stocks were sold for by plaintiff and the highest price which said stocks reached in the market within a reasonable time to replace it after defendant had notice of such sale.

As a further conclusion of fact I find that such reasonable time in this case would give defendant the highest price which said stock reached in the market in January, 1879, it not appearing from the testimony at what time in January the highest price for that month was reached, or at what time in December, 1878, defendant had notice of said sale.

As a further conclusion of law I find that defendant is entitled to damages to be recovered from plaintiff upon this counter-claim in the sum of $1,110.

With respect to the last item of counter-claim set up in the answer of defendant I find as a conclusion of fact that the plaintiff sold the 50 shares of Ophir in said counter-claim mentioned on the 22d day of November, 1877, as reported by him to defendant.

I find as a conclusion of law therefrom that defendant is not entitled to any damages upon this counter-claim.

I find that plaintiff is entitled to judgment against defen-
12 dant for the sum of $6,232.30, less $1,110, to wit: The sum of $5,132.30, with interest thereon at the legal rate from the 1st day of March, 1879.

W. H. DICKSON, *Referee.*

Filed Nov. 13th, 1882.

Judgment.

12½ (Title.)

This action having been referred to Wm. H. Dickson, Esq., to hear and determine, and the said referee having made and filed conclusions and findings of law and fact, whereby among other things it is found that the plaintiff is entitled to judgments against the defendant for the sum of $5,122.30 and interest thereon at ten per cent. per annum from March 1, 1879, now, on motion of Bennett, Harkness & Kirkpatrick, attorneys for plaintiff, it is adjudged that the plaintiff, Thomas R. Jones, have and recover of and from the defendant, William G. Galigher, the sum of seven thousand and twenty-eight dollars, and costs of suit taxed at $192.85 *dollars*, and that plaintiff have execution therefor.

Dated Nov. 20, 1882.

By the Court.

JOHN. A. HUNTER, *Judge.*

Attest:

H. G. McMILLAN,
Deputy Clerk.

Filed Nov. 20, 1882.

[12] *Notice of Appeal.*

(Title.)

To the above-named plaintiff and to the clerk of said court:

Notice is given that the above-named defendant appeals to the supreme court of the Territory of Utah from the judgment entered and rendered in this action in said district court in favor of said plaintiff against said defendant on the 20th day of November, 1882, for $7,028 damages and $192.85 costs of suit.

SUTHERLAND & McBRIDE,
Defendant's Attorneys.

Dated January 2d, 1883.

Served and filed January 3d, 1883.

(Title.)

Whereas the above-named defendant has appealed to the supreme court of the Territory of Utah from the judgment herein rendered

and entered on the 20th day of November, 1882, in favor of said plaintiff against said defendant for $7,028 damages and $192.85 costs.

Now, therefore, to perfect said appeal we, the undersigned, residents of the city and county of Salt Lake, Territory of Utah, do jointly and severally undertake, in the sum of two hundred dollars, that the appellant will pay all costs and damages which may be awarded against him on said appeal.

Witnes our hands and seals this 3d day of January, 1883.

A. HANAUER.
R. MACKINTOSH.

13 TERRITORY OF UTAH, } ss:
Salt Lake County, }

A. Hanauer and R. Mackintosh, being severally duly sworn, say, each for himself: I am a resident of said county and am worth the sum of two hundred dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

A. HANAUER,
R. MACKINTOSH.

Sworn to and subscribed before me, this 3d day of January, 1883.

[SEAL.] JOSIAH BARNETT,
Notary Public.

Filed January 4th, 1883.

"EXHIBIT A."

Statement.

(Title.)

This cause came on for trial on the 20th day of October, 1880, before the court and a jury empaneled and sworned therein. The amount of plaintiff's demand, as alleged, was admitted, and that it was due when the suit was commenced.

William G. Galligher, the defendant, was sworn in his own behalf and testified; I am the defendant, and during the years 1876, 1877, and 1878 lived in Salt Lake City. I had business transactions with plaintiff during those years, beginning in the fall of 1876. I had transactions with him in his business as a banker. I had a stock account with him during all that time. I probably had some desultory transactions with him in 1875, which were closed; the account began in the fall of 1876, or about the first of the year 1877. When the account first opened there was no agreement and nothing said about it, about margin or anything else or personal credit.

14 The way the account started was I had a call on some Savage which was in his office, which was called and bought, and a credit made to me on his books, and about that time I began to purchase stocks, gave an order—bought a call on Consolidated Virginia, etc. The account ran along in that way. Sometimes he would call on me for money, which I would put up, and sometimes I would draw on him. The account ran along until the fall of 1877 before we had any particular talk about the character of it. I never had

any written agreement or understanding with him about the business. He rendered me monthly accounts. I have most of them up to a certain date. These are some of them; the others have been mislaid. I have had them, though. These are up to the 1st of March, 1878. The business was transacted as most stock business was done at that time. I would go into Jones' office and would give him an order for the purchase or sale of stock; wrote it out part of the time and part of the time he took verbal orders. The business was done in that way, and we had several talks about money one time and another. Sometimes I would confess myself hard up, and could not put up money. Sometimes I would put it up, and sometimes I drew it down. The account was an open one. I was borrowing money largely there and at other banks. I owed him money most of the time. If I had money there any length of time I would draw it down. We never had any talk about margins or anything of that sort until, I think, in the fall of 1877. About that time I was operating in the Spanish Mine, in Bingham, and had a big lot of lead ore on hand, which I proposed to carry through the winter. The price of ore was very low then, and I saw the chance of being extremely hard up all winter. I had quite a line of stocks at the time, and I was afraid if stocks declined and I was pressed for settlement I would go under. I had a talk with Jones one night; I walked up as far as Godbe's corner with him and told him I thought I would go out of the stock business and attend to my mining. He asked me what was the matter, and I told him exactly the state of the case; that I was going to be hard up and would need all themoney I could get without having any in stock. He said: "Well, that don't make any difference if you want to carry your stock along. I have never bothered you for money so far, and I will not do so. You are good enough for me," and I said: "All right, I will think about it." However, within a few days after I sold out some stock and carried the other along. That winter between other stock operations and the failure of the lead market I got broke. During the winter and summer he often asked me for money—wanted me to make the account good. I told him I would as soon as I could; that is all there was of it. I did sell some stock—he sold at my request—and reduced the account some, and others were carried along until the next spring. Until the next fall I did not deal much in stocks—that is, through his office. I went to Leadville early in the spring, and when I got back I went at once to Virginia City. In the meantime stocks had advanced, and my account, from being several thousand dollars behind with him, was in the neighborhood of even when I went to Virginia; that is, it was in the neighborhood of a point when my stocks would have sold for as much as I confessed myself to be indebted to him. I went to Virginia some time in August and staid there until September. I came back here in September for a few days and went back to Virginia City and staid there until the grand wind up. In the month of November we had some correspondence with reference to the account. He wanted me to make the account good, as he called it—put up more margin—and while I had some money at that time I was operating with it, and I had a

lot of other obligations, and I thought Jones' account was in about as good shape as many of the balance of them, and so wrote him. Finally he wrote me a pretty sharp letter, saying unless I made the account good he would close it out. Some time in November I ordered him to sell the Justice, Alta, and Tip Top stock I had with him, and put the money into North Bonanza. I was there at the time and knew there was a deal in progress in North Bonanza. This is the dispatch. I received a reply to that part of it relating to Mexican. The order he did not reply to until the second day after. After waiting a reasonable length of time I telegraphed and wanted to know what he meant by not reporting.

16 By plaintiff's counsel:

Q. Who bought and held the title to the stocks?

A. Jones bought the stocks and they were carried in his name or in the name of his broker down below.

Plaintiff's counsel objected to the introduction of these telegrams for the reason that it appeared the stocks were bought in the name of Mr. Jones, and the whole transaction shows he held them as security for advances, and without paying those advances the witness could not order those stocks sold and an investment of the money made in something else.

Objection overruled and defendant excepted.

I received an answer to my dispatch of the 14th. This is it. On the 16th I think I received a letter from him in answer to my telegram. This is it. It came one day late of due course of mail.

Telegrams and letter read in evidence and marked as exhibits "Defendant's 1," "Defendant's 2," "Defendant's 3," "Defendant's 4," and "Defendant's 5."

When I ordered the sale of Justice, Alta, and Tip Top, I did not make any arrangement about the sale of North Bonanza. Of course I did not know how much North Bonanza I was going to have. When North Bonanza went up to five and a half or six dollars I was offered five and a half for a thousand shares of the stock. At the time I gave the order the stock was one and three-quarters or two dollars that morning. I limited it high in the telegram, so as to be sure to get it,

Q. When did the rise in North Bonanza take place?

PLAINTIFF'S COUNSEL: We object to all evidence in regard to North Bonanza on the ground that there was no obligation on Mr. Jones to buy it, and there was nothing in the telegram to notify him the witness had any reason for buying it or any reason for selling it.

Objection overruled and plaintiff excepted.

17 The amount which would have been realized on sale of the stocks ordered sold is about what we state in the answer. When we made up the answer we referred to it. It was fresh in my memory then. It was more than it was a few days after, and they

went down 100 per cent., or such matter. Nine dollars was probably the price of Justice that day, Alta $18, and Tip Top $1.60. I don't remember the price for which they were sold. I did not get any account of the sale until after the suit was brought. The accounts were rendered to me the next winter when I came back from Pioche. I did not make any arrangement for the sale of North Bonanza when I ordered it purchased, because I did not know how much I would have or what price it could be bought for. I subsequently sent Jones another telegram saying I claimed one thousand North Bonanza. After I received Jones' letter I wrote him the same day. The telegram of the 16th was after I received his letter.

Telegram read in evidence and marked Exhibit, "Defendant's 6."

I meant by "fill your shorts" it was liable to advance and he had better buy it in if he had not already done so.

Q. Did you make any agreement to sell this stock if you got it?

Objected to by plaintiff on the grounds before stated, and also that there was nothing in the telegram to notify plaintiff that there was any special reason for buying North Bonanza at that time. Objection overruled and plaintiff excepts.

It is understood all the evidence in regard to North Bonanza comes in under plaintiff's objection.

A. I made no positive arrangement for the sale of it. A man said "I will give you five and a half for a thousand North Bonanza." I said "I will tell you after a while; I don't know whether I have got it or not." This was subsequent to the sending of the dispatch in which I made a compromise claim of a thousand shares. Within the next two succeeding days the market for North Bonanza in Virginia City was from five to six dollars. It sold as high as six dollars, five, five and a quarter, and five and a half was offered
18 for it in big blocks. It was that price along for two or three days. It may have been a day or two after my telegram of the 15th, or it may have been the following day. Stocks are bought and sold in one day. Usually orders given in the morning would be reported that night, and sometimes not until the next morning. Orders direct to Virginia would usually be filled that day, right after the board. The market was very active and stocks would be reported sometimes within an hour. I think the plaintiff only sold stock once without any orders. I came back from Virginia some time in September, 1878, and was only here a day or two. I went into Jones' office. The account was still open. He handed me an account current, a memorandum of the sale of some stocks. I have forgotten just what they were; I think there was some Utah. He says: "Here, I have sold this for you since you have been gone." I handed the account back to him and told him: "Whenever I want my stock sold I will give you orders for it." That afternoon he says: "Well, it is a good sale for your account; the stocks are lower now, and it is a good sale." I says: "I don't care whether it is good or bad; when I want any stocks sold I will tell you about it." That is all the conversation I ever had on the subject, and never had an ac-

count since until the final one was rendered. I did not learn any other stocks were sold without orders until I got notice of the bringing of this suit. I never gave any orders for selling the stocks now reported sold. Prior to the time I ordered Justice, Alta, and Tip Top sold in November. I had frequently given orders for the sale of stock.

The account had not been active all summer. I don't know as I had sold anything out of the account. Except on the occasion I speak of, I think stocks had not been bought or sold without my order. I almost always gave written orders. We dealt in verbal orders unil we had a little difficulty about the sale of some Alta. After that he demanded and I gave written orders. I don't think during these transactions he claimed the right to sell without orders or exercised it. On one occasion he sold without orders and I repudiated it as soon as it came to my knowlege. I did not consider it an account that could be closed out in that way, and I don't think he hid. He had always filled my orders. I had never given an order before that he had not filled within a reasonable time; I could not say how many times; I had given orders a great many times. The transactions run over a long time, and the account was active, and orders were given for a good while every day. In the latter part of the transactions the orders were in writing or by telegram. I have a report of sale of Ophir stocks in November, 1877. At the time referred to I had fifty shares of Ophir with him and a call for fifty, which was guaranteed by his office. A call is a privilege to purchase at a certain price. I went out of town that week, and Ophir was selling about thirty to thirty-two per share. I left an order with Jones, good for a week, to sell 50 shares of Ophir at $37.50; I came back late in the week and found Ophir had jumped to that point. I said to Jones: "I suppose my limited Ophir is gone?" There was nothing more said about it; it sold on the street that night for over $40. The transactions in Ophir were lively, right here in Salt Lake; among other transactions Mr. Jones made several; I sold him the fifty shares for which I had a call, expecting this limited order of mine had been filled. That night I went to his office to see whether it had been, and saw his dispatches on the desk—dispatches from his brokers, Latham and King; they were doing part of his business below; his dispatches are in cipher; I went in and looked at this dispatch. I was familiar with the cipher, and had often helped him translate his dispatches, and knew most of his cipher words at that time. I saw he had made on this dispatch a note of sale of 50 Ophir on my account; I looked at the body of the dispatch, and there was no Ophir sold in it; I did not like the looks of that. Ophir was then over $40; dispatches that night said it was going up booming. I went out of the door and found Colbath standing there, and told Colbath to go back and look at the dispatch and see if there was any Ophir in it; he came back and told me there was no Ophir sold in the dispatch. I did not say anything about that business until I went to San Francisco and saw Homer King. It was reported to me sold about that date—November, 1877—when I got my account in for that month. The shares on which I had a call I sold to

Jones across the counter for $39 the same day before the others had been reported sold. The price of Ophir went up to $60 *dollars* within a few days, and afterwards went to $100; I think the quotation in November went to $60.

I had 600 Challenge stock in Jones' office; I bought it in 1877 or 1878. It was reported sold in the final account which was rendered; it was sold about the 29th of November, 1878; I don't know anything about the sale of it; I think it was sold at a dollar and a quarter; it sold in the market for $6.00 before I put in my answer; I think it was in January. It was in January, 1879, that the rise in the stock market occurred. I heard first of the sale when I was in Pioche; I left Pioche and went to San Francisco in February, and then the market was up. I never gave any order for the sale of the Challenge stock or any stocks sold in November, 1878. All the sales made after our Bonanza trouble were without orders.

Statements of account put in evidence are marked "Defendant's 7."

Cross-examined:

The account was opened the latter part of 1876. We had an agreement as to interest; the interest started, I think, at two per cent., was afterwards reduced to one and a half, and I don't know but one and a quarter per month at one time. It was contemplated he should make advances; I don't know that it was understood he should buy the stocks in his own name; I don't know how they were bought or whether his broker carried him; I know he sometimes owed money on stocks below; then they were sometimes probably carried in somebody else's name; he did not buy them in my name. The stocks, therefore, were not carried in my name; in all those things they are usually carried in the name of some trustee; there was never any special agreement in regard to any stock. I have gone in there and made an offer for stock, and said: I will give some money such and such a day, but never any specific trade with reference to any one stock. It was understood, in a general way, that I should keep the account good, or make it
21 good; I was to give him money when he wanted it, and take money down when I wanted it. In 1878 he began to call on me for money, and I was unable to put it up; the stocks I then had were not sufficient to make my account good; I think my account was several thousand dollars behind, selling the stocks at the market price. It was about the time I went to Virginia; that condition of affairs had existed for several months; I think I got into extremely deep water during the spring; he asked once or twice for money, and as long as I thought I had a chance to pull through I said I would try to pay as soon as I could; then when I found that I could not get through, I told him I did not know when I could; the business had all been done here through his office; sometimes I telegraphed him from Bingham, or Alta, or some other place; I had no special arrangement with him when I went to Virginia City; he was not to buy all the stocks I ordered without reference to the state

of my account; I could have swamped him if he did; as my account then stood I reasoned that when I ordered any particular stock bought, he had the right to buy or not as he chose, depending on the state of my account; in the condition of my credit with him at that time I would have to provide for the payment of the stock ordered; that is the reason I provided for the purchase of this stock by ordering the sale of other stocks; there was no agreement as to the amount of stock he would buy, nor of what kinds; he always bought anything I asked him to; I suppose each transaction amounted to a separate one—if he chose to fill it, all right; if he didn't, all right. I don't suppose I could have made him buy stocks unless he wanted to; he usually wanted to, though. When I went to Virginia there was a pretty big debtor balance against me, but stocks began to go up in July and afterwards it got about even; the balance on the July account seems to be about $9,000, and remained so down to about November; I think I had 320 shares of Justice in November; the account for August shows 220 shares; there was a sale of 100 shares that I refused to take; is was sold at $8.47; that was the account I got when I came back from Virginia, and [I]
22 told him I would give orders when I wanted stock sold; that was in September and he handed me a memorandum of the sale; the general account was probably made up at the end of the month; I think Justice was a little lower when he handed me that report of sale; it has not been lower ever since; I think within a month it was up to twelve or thirteen dollars; I could have filled at a less figure than the sale. In November he held but 220 shares according to his showing; I received the telegrams of August 26th and 27th in San Francisco. This letter of August 28th is mine.

Telegrams and letter read in evidence and marked as Exhibits "Plaintiff, 1, 2, and 3." Witness identified two letters and they are read in evidence and marked as Exhibits "Plaintiffs 4 and 5." Witness also identified two other letters read in evidence and marked "Plaintiff's Exhibits 6 and 7."

The stocks were to be bought and sold in San Francisco; I think Jones' letter of the 13th of November was one day late, and that I did not get it until the 16th; I answered it; this is the answer and it is dated the 15th; I had an impression it was a day late; I telegraphed the same day; I might have made a mistake in the date of the letter; I am not sure about that.

Letter read in evidence and marked "Plaintiff's Exhibit 8."

I received the letter shown to me from Jones.

Read in evidence and marked "Exhibit 9."

This is his answer to my telegram of the 16th, in regard to 1,000 shares of Bonanza.

Read in evidence and marked "Exhibit 10."

My impression is North Bonanza was worth November 13th $1.75 or $1.85; was a new stock on the board; had been probably

$1.20 or $1.25, or along there, and had been going up for a day or two; the mill is situated in Flowery district, east of Virginia; never paid a dividend; it had some ore in it which at that time, under proper management, would pay a profit; there was metal in it; the fellows that owned and controlled it were going to make a deal on it, and while it might not have been a dividend payer, it was showing well enough for the purposes of putting up the price; it has been
23 assessed regularly since, and one would be a loser by holding it; it was a speculative deal among the owners of the stock based on the developments in the mines; there was nothing in the development of any of those mines to justify that jump at that time; I don't know whether I was inside the ring or not; I had some information that made me believe it; the stock did not go up on the merits of the mine as a dividend-paying mine, but I had been through the mine and saw what they had; as to the price since it all went to pot; it has been down to twenty-five cents, and from that up to a dollar and a half, just as it happened; the little flurry was simply a speculative deal among the holders of the stock at that time; the stock failed when the balance of the thing failed, and the cross-cuts turned out badly afterward; I don't recollect what the stock was worth on the 15th, when I received Mr. Jones' letter; it went up though within a day or two; I think it was up to three and a half the next day; the mail arrived in Virginia City in the morning or about noon—my impression is about noon; it was in time so stock could be ordered bought on the afternoon board in San Francisco, and you could buy them at any time up to 7 o'clock in the evening; in my order to Jones to invest in North Bonanza I gave him no information except that contained in the telegram; I did not convey to him any information about this little speculative matter. I did not think I had to. I should think he was not in justice obliged to buy any stock I might order bought. I might have ordered a great deal bought and swamped him, but anything within reasonable limits that I had provided payment for I think he ought to have bought. I had provided for this North Bonanza by the sale of other stock. My account was $8,000 behind.

Q. Had he not the right if you ordered stock sold to apply that to the account?

A. My idea was that he took my personal credit.

Q. Did you understand he took your personal credit alone without reference to the stocks he held in his name?

A. No; I presume he always had a lien against the stocks,
24 but I don't think when we opened the account the value of the stocks had particularly much to do with the account.

Q. Did you not regard it that he held these stocks as security for his account?

A. Yes; certainly.

Q. Then why should you expect him to put it into Bonanza without his consent?

A. I should expect him to fill my orders; anything within reasonable limits. If I went to plunging and ordering a big lot of stock I did not suppose he would do it.

(Witness continued.) If he had bought North Bonanza and held it ten days it would have been lost, but we did not hold any ten days. The offer of five and a half for 1,000 shares was a genuine offer. I think the highest price in San Francisco was five and a half in the informal board. In the regular board I think it sold for five dollars. I think it was $5.50 or $5.75 the morning of the day it was the highest. Stocks broke and it was the only stock that stood up. The offer of $5.50 in Virginia City was by a responsible man. I knew him to be good. He made an unconditional offer. I only refer to one offer. There was a thousand cases of it. I don't know the date when I first knew the 220 shares of Justice, and 50 Alta, and 200 Tip Top had been sold. I was some time in December, I think. The prices of those stocks have been up and down since. They were about as low at that time as they have been since. I don't know that I could have replaced them at less than they were sold for when I learned of the sale. I think when I got to San Francisco they were higher. The general tendency of stocks since that time has been downward. I suppose on an average they are not now worth half what they sold for; Challenge, for instance, has never been any lower. The sale was about the lowest point. Some of them have been a good deal lower, and some of them assessments have eaten up entirely. I think that since my letter of November 15th, to Jones, I have not given him any orders or meddled in any way with the stocks in his hands.

Q. You intended to abandon them to him at that time?

25 A. I did not intend to abandon all the claims I had against him. I don't think that I wrote that letter until the 16th. Since the letter was written I have not meddled with the stocks in his hand, nor given any orders in regard to them. It was after that he sold the stocks of the sale of which I now complain. I did not expect he would hold the stocks until they went to nothing; I expected he was to settle this Bonanza business on some basis of settlement. That letter was written in the heat of passion, when I saw I had made a big losing through him, and I hardly knew what it was intended for. I have not acted on that letter from that day to this; before I got round here again the stocks were sold. If I have any stock in his hands still they are not worth anything. Of course I have not bothered with the account since. I knew we had to come to some trouble at law, and it was of no use to complicate the case with any further orders. I have been dealing actively in stocks since about 1870. In the absence of a special agreement I knew of no custom among stock brokers to sell stocks without notice or a written order. I did not care what Jones did after my letter of the 15th. I expected him to settle for the North Bonanza, and in that event he had no reason to sell the account out. That was my idea of it. With that credit the account would have been good enough.

Q. Then you intended to have the stock in his hands even though it should go down without any order?

A. It did not go that far down in my thoughts. I thought the market would go up again, and it did go up and settle again. All my ideas about this were based on the Sierra Nevada being good.

I had no idea the market would take the course it did. This is one of my orders for the sale of the 50 shares of Ophir. It was reported sold within a week of that. It was not sold, however; I knew it, because I asked Homer King and he said he had not sold it, and he had no order to sell it. I know Jones was carrying stock at the Bank of California. I did not see any telegram from the bank. He did all his business with Latham & King, and he said the
26 order would come through him, and it did not. I have seen Mr. Richard's deposition, but have not examined the books of the Bank of California. I have no doubt the bank sold 200 shares of Ophir for Jones on the 22d of November, but this order was sent to Latham & King. I knew it because I saw it on his dispatch. There was Ophir noted on the margin, but none in the dispatch. Jones put on the marginal note. He would not likely put it on the wrong telegram. I have frequently seen the report of the Bank of California to Mr. Jones of stock sold. I recognize this as one of their reports, and this as another. It does appear he sold 200 Ophir on the 22d of November. He sold a lot of stock that day Ophir was very active. He gave me credit for fifty Ophir along at the end of the month. I know what that Ophir was that was sold. One hundred shares he got from DeWoolf; fifty of it I sold him across the counter, and I know where he got the other fifty. I don't suppose my Ophir was kept separate in California. If he sold enough out of his account it would be all right, but I don't suppose if he sent my order to one broker and he did not sell it that I was to be credited with it. I found out in California that he sent the order to Latham & King; the broker told me so. I know nothing of my own knowledge except that that is the reason I delayed talking about it until I could go down and see about it. My limit in the order is $37. He credited me $37.50, the average of the sales that day. That is my order. Papers identified by witness, read in evidence, and marked "Exhibit 11, 12, 13, 14, and 15."

I looked at a telegram from Latham & King the day the sale was reported and saw no Ophir on it, and saw on it a pencil memorandum that 50 shares of Ophir had been sold for me. The telegram now shown me has no pencil memorandum of any account on it, and I cannot recollect whether this looks like the telegram I saw. This is a telegram from Latham & King, report sales November 22d, and received at 5:52 a. m. It was after dark when I saw the telegram; I inferred from what I saw that he did not sell my 50 shares of Ophir. I never mentioned the thing after that until I went to California and inquired about it. I think that was a year
27 afterwards. I went to California once in the meantime and tried to see Latham & King, but did not get a chance to talk about it. I never said anything to Jones until my answer was put in.

Q. You had monthly accounts?

A. I never was certain of it until I saw King in California. All I could learn from King was that he had sold no Ophir that day. His telegram showed the same thing. He might have had another telegram from King on the same day, or something of that kind.

Up to that time I had monthly reports and a good deal of the time long afterwards, and they were based on and included that reported sale. I let it go right along. I did not speak to any one about it except Colbath and Craig Chambers. I said I would look the thing up, and when I was certain I would speak about it. I presume he rendered me an account of the sale on the morning of the 23d; I don't recollect. It was his custom, inasmuch as Ophir went up to $100 after, that I did not consider it well sold. It took only a few days to get to $60, and then went to $100. I ordered 100 Ophir bought at a less figure the next day. It may have been I was not willing to give $37.50 the next day. I may have given that order to fill a short. The value of stock didn't show anything about what I thought about the stock.

Order identified by witness, read in evidence, and marked "Exhibit 16."

I don't know how long after the reported sale before Ophir went below $35. There have been plenty of times I could have filled for less than that. I can buy it for $7 or $8 now. It has paid one dividend of a dollar a share since November, 1877. I think when I ascertained the 100 Justice had been sold without order I could have filled it for less than the sale; I did not do it; I am not certain I could then; I could have filled it afterwards for less. I learned the Challenge had been sold probably some time in December. I did not know for how much. My impression is I got an account of the sale some place; I don't believe I got it until about the time the answer was put in, but I am not certain.

28 Reports of sales shown witness, who says they include all the stocks named in the answer as sold, except 100 shares of Justice and 25 Alta previously sold.

Papers identified by witness, read in evidence, and marked, "Exhibits 17, 18, 19, 20, 21, and 22."

The 25 Alta was sold and credited to me, and I think that was reported to me at the time I told him I would order sales when I wanted them made. The price of Alta was a great deal lower than the sale when it was reported to me. I could have filled much lower and made money by taking the sale on everything but Utah, perhaps.

Redirect:

I repudiated the sale when notified of it because I did not propose to establish any precedent to sell stocks without my order. I had no written contract with him in regard to sale. With some of his customers he had written contracts which he called iron-clad, and which surrendered all rights of the customer into the hands of the broker; they are common in San Francisco with a certain class of customers; no contract was required from me; no contract as to specific margin, no contract about a margin. My understanding was the stocks were bought out and out for me; if the stocks were not good for it I assumed to be good myself when the account was

started, and I was good at the time; I was solvent. I understood these stocks were no more security than my personal credit or any other property I had was security. Of course these stocks were subject to any judgment or claim anybody might have against me. I did not consider he had any lien without process until I received these letters from him. I don't think he ever asserted any claim on that account against these stocks, not in terms. This letter of mine is the 28th of August, and, as shown by the books, he sold some stocks on the 31st; he probably sold before he got the letter. I had been to Salt Lake between that and my letter of November 5th. When my letter of November 13th was written Sierra Nevada was on the cross-cutting, and I and everybody there expected the market would go up booming,
29 and I thought inside of a week the account would be out of danger, and I wanted a very little time, and I thought the market would go up 200 or 300 per cent. His letter was a little ambiguous. I did not know whether he meant to take stock (Mexican) at the quoted price, or let me deposit it to trade on. I was short of money and wanted time. I offered to make him what I considered safe, and deposit 50 shares with his brokers, and he wanted 25 shares sold absolutely, and I did not want to sell Mexican at those prices. I gave him no orders after my letter of November 15th, and after he had refused to follow my orders in the matter. Whether Jones told me in words or not that the order for the sale of the 50 Ophir had gone to Latham & King I do not know; my impression was got from Jones or from something I had seen about the office. I understood the order had gone to Latham & King, and that was the reason my attention was directed to the telegram. My impression is King said he had an order which had been overlooked, or something of that kind. I did not find this out until I was leaving San Francisco for Pioche, and I had no chance to talk with Mr. Jones about it since. I was not informed of the fact absolutely. There were other stocks sold on the 22d of November, and there was a good deal of dealing in Ophir at the office that day. Jones bought a call of DeWolf, and sold some of Sears' Ophir, and I sold Jones 50 shares myself at $39 along in the afternoon. Ophir fluctuated very violently for a few days succeeding that—went up to about $60, I think, in a few days. Either that night or the night after we got the reason for the jump up, that the Bonanza people had caught McDonald short of it, and it went up on that account.

Recross-examined:

The Challenge mine is situated in Gold Hills. I did not understand that I could sell out these stocks, take the money and apply it to anybody else as long as my account was behind. Of course they are in some measure security. I never considered the
30 matter at all whether I could have Jones sell those stocks and turn me over the money. I know I would not attempt to do it.

o

Redirect:

I mean to say I would not do it, I don't mean to say I could not do it.

Monthly accounts, "Defendant's Exhibit 7," put in evidence.

L. U. COLBATH sworn for defendant:

I know the parties to the suit. I remember the circumstance of defendant calling my attention to a dispatch from Latham & King, November 22d, 1877, in Mr. Jones' office. I did not know all the ciphers, but in talking over the matter the defendant and I agreed on the word Ophir. I saw the dispatch and there was no Ophir in it. There was a note on it. Fifty shares Ophir sold for Galligher.

Cross-examined:

I did not take the dispatch in my hand to read it. It lay on the table, Jones was figuring at his desk. I don't know whether Mr. Jones knew we were reading the dispatch. Nothing was said to Mr. Jones.

Plaintiff's counsel reads deposition of HOMER S. KING, as follows:

My name is Homer S. King; age, 38 years; residence, San Francisco, California; occupation, stock broker; my residence and occupation were the same in 1878.

November 13th, 1878, North Bonanza stock sold for $2.50 and $2.40 per share; the highest price between November 13th and 30th, 1878, was $5.00 per share. On the same date Alta sold for $12.00 and $11.75 per share, Justice for $7.50 and $7.75, and Tip Top for $1.40 and $1.25 per share; these are the quotations in the San Francisco Stock and Exchange Board. Between the 13th of November, 1878, and the 1st of January, 1879, Justice and Alta fell; Tip Top remained about the same. The lowest price for Justice during that period was $3.50, Alta about $5.00, and Tip Top about $1.25 per share.

31 On the 13th of November, 1878, I sold for plaintiff the following stock at the prices named: 50 shares Alta at $12 per share; 50 Justice at $7⅞; 170 shares Justice at $725; 200 shares Tip Top at $1.40 per share. On the 27th of November, 1878, I sold for plaintiff 25 shares Alta at $7.75, 200 Justice at $4.40, 20 Justice at $4.50, 200 shares of Tip Top at $1.25 per share. On December 16th, 1878, I sold for plaintiff 100 shares Tip Top at $1.40, 50 shares at $1.35, and 50 shares at $1.45 per share. November 27, 1878, the market price for Alta was $7.75, for Justice $4.40, Tip Top $1.25 per share.

Defendant rests.

THOMAS R. JONES, the plaintiff, sworn in his own behalf, says:

I am the plaintiff. I had dealings with the defendant from about December, 1876, until about the 1st of January, 1879, and bought a great many stocks for him during that time. As Mr. Galigher stated, there never was any written agreement between us; if his account got down I asked him to make it good. I don't think

we ever had a close talk about the matter. It was always understood by him that I must keep his account good. He always used the word "solid." He would ask: Is my account solid this morning for so many shares of stock?" I would look at it and usually, I think, told him yes. I don't know that I ever told him anything else. I don't know as he ever asked me to buy any when I did not buy them. The stocks were always held as security, aud I looked to see what the stocks were worth and the amount he was owing. I bought the stocks in my name and held the title. He knew that. I sent no telegram to buy for Galigher. I sent, "Buy me such and such stocks," and they were charged to me. I held the stock for his account. It was always understood between us from the beginning of the transactions that the stocks were held as security for the account, and counted at what they were worth to see whether his account was good. When he would ask whether his account was "solid" I would look up the account with reference to the stock and its value that he wanted to buy. I called on him to put up
32 money to make it solid a good many times. He did so as long as he had any money to make it good with. He has had calls from my office, but that would be different from a regular account. It would go into the regular account because it was understood he should pay interest on the call; at least it shows in the statement, but the stock itself was never charged to him unless he called it. There was no agreement, none in the world, between us by which I was under any obligation to buy any stock for him, except from time to time as he came in. Each agreement or purchase depended upon the state of his account. I don't know of any other way I can express it. That is the way the account ran right along. I don't think we ever had any talk about what we might do next week or to-morrow. When I would sell stocks I would credit the proceeds to his account. No other disposition of proceeds was ever made. If the market value of the stocks in my hands would depreciate so they were not worth the money he was owing, I usually, or always, I believe, asked him to make his margins good, and he would do it if he could. Sometimes his account has been standing in good shape, and then he drew some money, but not from any distinct sales. He never drew money when the stocks remaining with me were not of the value of the remaining account. He may have drawn $50 or $75, but never any money to amount to anything. I had been buying some for customers before, but I hardly went into the business until December, 1878. As to the statement in the answer that on November 13th I had 320 shares of Justice belonging to him, it might be considered either way. I presume he is correct if he refused to take that rate. I had been asking for margins by letters, and his answers made suggestions, and I at once sold Justice, Alta, and Utah as marginal stocks—sold them without an order. I sold 100 shares of Justice and 25 of Alta August 31, 1878. Eight dollars and forty-seven cents is what Justice sold for, and Alta for $18. As he stated, on the morning after a sale a bill or memorandum of it would be made and handed or enclosed in an envelope to the party. I have no recollection of what was

done with the notice in this case. I think he did refuse the sale, but I have no recollection of the particulars, and I
33 do not remember what the price of Justice and Alta then was, but they were much lower, probably about half. Since then they have been down to nothing, and some of them have been higher, I presume. At that time I think the sales made were good ones, and could have been filled for much less at any time within the next month or two, even those sold the 27th and 29th of November. I sold 600 Challenge on the 27th and 29th of November. The object in dividing the order was not to throw too much on the market at once. I don't know that he had any advice of that until the 1st of the month, which would be two days after. The price of Challenge through December, 1878, was $2 the highest and $1 the lowest. This paper is very accurate, but only gives the highest and lowest price during each month. Since then, I think, it has been down to nothing, with assessments added, and interest. It fluctuated considerably in 1879. There has been one assessment of twenty cents. Since defendant wrote the letter of November 15th, 1878, he has given me no order to sell or do anything with the Chellenge stock. Justice stock for September, 1878, the highest price was $12 and the lowest $9 per share; October, the highest and lowest was $12 and $8; in November, $9 and $4, and December, $5 and $3.50. Since then, as a general rule, it has been much lower. The highest in 1879 seems to have been $5⅛ and $2 the lowest. It is a stock which has been considerably assessed. I guess, $2 per year would be within bounds. In December, 1878, the highest price for Tip Top was $1.50 and the lowest $1.25 per share; January, 1879, highest, $1.30; lowest, $1; February, highest, $1.35; lowest, $0.85; March, highest $1.10 and lowest 50 cents per share. There have been no dividends since I sold on Justice, Challenge, or Tip Top. I only received one telegram from Latham & King, November 22d, 1877. This is it. I don't think there has been any pencil memorandum on it showing any sale of Ophir for defendant. Ophir in November, 1877, ran from $13⅛, lowest, to $54.50 per share, highest market value; December, $54.50 highest and $45 lowest; in January, 1878, $56 highest and $40 lowest; in February the lowest
34 was $48; the highest is blotted and I cannot make it out; March, $64.75 and $24.50 are the highest and lowest; April, $47 and $25; May, $44 and $28.50; June, $53 and $39.50; July, $64 and $34. In September, 1878, ten months after the sale, it reached $98, and the next month $34; November, 1878, $58.75, and December $44 and $33 per share. From that time the general course has been down—down to $2. There has been one dividend of $1 and two assessments, and, taking assessments and interest on the price it sold at, it would be more than nothing to-day.

Cross-examined:

The paper I hold in my hand shows the sales of the regular boards. There are a great many transactions at informal sessions and on the streets, but none recorded. I think they keep a record of informal sessions, but I am not positive they did then. The present price of

Challenge is 90 cents, I think; I cannot tell what is the highest price it has since reached; I have not the record here. Tip Top has risen within the last year, and is now quoted $3.25, and, I think, has been quoted as high as $7. I think the highest price since I sold has been $7: that was within the last year, and perhaps within the past three months. Three dollars and twenty-five cents seems to be the highest price for Challenge in 1879.

Deposition of HOMER S. KING, taken on the part of plaintiff, read in evidence as follows:

My name is Homer S. King; age, 38; residence, San Francisco, California; occupation, stock broker; my residence and occupation were the same in 1878. I am acquainted with the plaintiff. On the 27th of November, 1878, I sold on account of plaintiff 300 shares of Challenge stock for $1.25 per share at the 11 o'clock session of the San Francisco Stock and Exchange Board, of which I am a member, and November 29th, 1878, at the same place and board, I sold for his account 300 Challenge at $1.25 per share. This was the regular market price at said board on those days.

Cross-examined:

I sold no other Challenge stock for plaintiff prior to January 1st, 1879.

35 Deposition of E. A. RICHARDSON read for plaintiff.

My name is E. A. Richardson; age, 37; residence, San Francisco, California. I am now, and was in 1877, stock teller of the Bank of California. I am acquainted with the plaintiff. November 22d, 1877, there were sold by the Bank of Califonia, upon the order of plaintiff, 100 shares of Ophir stock at $39 per share, and 100 shares at $36 per share.

Cross-examined:

November 23d, 1877, we sold for plaintiff 60 shares of Ophir at $52; November 24th, 100 shares at an average price of $46.56, and on the same day fifty shares at $46.26, and one hundred shares at $50 per share. This is all the Ophir sold for him prior to January 1st, 1878. To the best of my knowledge the highest price of Ophir previous to July 15th, 1878, was $56.25 per share.

Exhibits put in evidence and referred to in the foregoing testimony:

DEFENDANT'S EXHIBITS.

No. 1.

Telegram from defendant to plaintiff, dated Virginia, Nevada, November 13, 1878. Received at Salt Lake 10.30 a. m., same day:

"Turn my Tip Top, Justice, and Alta, without limit, into North Bonanza, limit 2¾. Do you mean credit 25 Mexican, present prices?"

No. 2.

Telegram from plaintiff to defendant, dated Salt Lake, November 13th, 1878. Received at Virginia City, 6 p. m., same day:

"Want the 25 Mexican to hold the same as other stock for your account."

36 No. 3.

Telegram dated Virginia, Nev., November 14th, 1878, from defendant to plaintiff, and received at 5.11 p. m.:

"Did you fill my order of yesterday? Reply by telegraph in cipher to-day."

No. 4.

Telegram from plaintiff to defendant, dated Salt Lake, Novem- 15th, 1878, and received at Virginia City, Nevada, 10.20 a. m., same day:

"Did not act; you will receive letter this morning."

No. 5.

Letter as follows:

SALT LAKE CITY, *November* 13, 1878.

W. G. Galigher, Esq.

DEAR SIR: Your telegram of this a. m. received: "Turn my Tip Top, Justice, and Alta without limit into North Bonanza, limit 2¾. Do you mean to credit 25 Mexican at present prices?" to which I send the following reply: "Want the 25 Mexican to hold same as other stocks for your account," meaning that I want it as additional margin on your account. Not knowing anything of North Bonanza except its feline reputation, I must decline to relinquish Comstock securities for "wild-cats," although by the turn you propose we should have more of them.

Yours truly, T. R. JONES.

No. 6.

Telegram from defendant to plaintiff, dated Virginia, Nevada, November 16, and received at Salt Lake 10.40 a. m., same day:

"I claim 1,000 North Bonanza. You had better fill shorts."

37 No. 7.

Monthly statement of account:

SALT LAKE CITY, *January 1st*, 1877.

Wm. G. Galigher in account with T. R. Jones.

1876.

Dec. 15.	To telegram to sell 100 shares Savage ----------	$1 50
Dec. 15.	To commission on sale of 100 Savage and tel--	13 00

Dec. 15.	To 100 Savage, $10		1,000 00
22.	To call on 50 Con. Va		150 00
26.	To 100 Ophir, 21⅛		2,112 50
"	To com's'n and tel., $3		24 12
	To interest to Jan. 1		5 35
			$3,306 47
Dec. 15.	By 100 shares Savage sold		1,156 00
	Bal. Jan. 1, 1877		2,150 47

Stocks on hand, 100 Ophir.

Successive monthly statements are made up in substantially *in* the same form, the balance and stocks on hand varying. The balances in the statements are as follows:

February 1, 1877.	Dr. balance		$36 01
March 1, "	"		4,015 35
April 1, "	"		3,622 23
May 1, "	"		5,883 40
June 1, "	"		1,595 11
July 1, "	Cr. balance		1,622 89
August 1, "	Dr. balance		541 50
September 1, "	"		848 60
October 1, "	"		7,825 01
November 1, "	"		9,236 69
December 1, "	"		8,239 64
January 1, 1878.	"		10,004 11
February 1, "	"		10,873 76
March 1, "	"		7,885 76
April 1, "	"		8,109 09
May 1, "	"		8,583 05
38 June 1, 1878.	Dr. balance		8,787 18
July 1, "	"		8,762 64
August 1, "	"		9,471 70
September 1, "	"		8,117 65
October 1, "	"		8,676 56
November 1, "	"		9,944 51

Four months' statement, from March 1st, 1878, to March 1st, 1879, balance, $6,252.30.

In the debtor side of the accounts there are charged the price of stocks bought, telegrams, commissions, and assessments paid on stocks carried, and moneys drawn by defendant. On the credit side are placed receipts from sales of stock and cash paid by defendant.

In the statements Sept. 1, 1878, appears credits for 25 Alta sold at $18 per share, and 100 Justice sold at $8.47 per share, and the list of stocks on hand at that time contains 25 Alta and 220 Justice. The statement for November showed sales and credits, among others, of 25 Alta for $93.75; 220 Justice for $970; 600 Challenge for $750, and 200 Tip-Top for $250.

The final account shows stocks still remaining on hand are 1,000 North Chapman, 500 St. Louis, and 2,500 Touquerville.

PLAINTIFF'S EXHIBITS.

No. 1.

Telegram from plaintiff to defendant, dated Salt Lake, August 26, 1878, directed to San Francisco:

"Would like to reduce; what shall I sell? Afraid to hold longer."

No. 2.

Telegram from same to same, dated August 28, 1878:

"Account must be reduced; have you any suggestions to make? Have no confidence in market."

39

No. 3.

SAN FRANCISCO, *August 28th*, 1878.

Mr. T. R. Jones.

MY DEAR SIR: I received your telegram last evening, but did not answer by wire because I did not know what to say that could be said by telegram. I don't want to sell any stock, because I have nothing with you that has advanced to anything like what they ought to be, except Utah, and with the excitement at that end of the lead it is almost sure to go to sixty or seventy-five dollars on this spurt. They have undoubtedly got a bonanza S. Nev. The mine will be thrown open to experts to-morrow, and I look for a big advance on their report. At all events, the insiders are buying everything that is offered, and on that point I am not mistaken. The streets and country is pretty well cleared out of stocks. The south end is being operated the same way. Outsiders are buying all the stocks, putting them up and down to suit their purpose. They have got a bonanza on the Comstock, and I know the locality of it, and there will be, I think, plenty of time to get aboard. The market is not going to get worse, there is no fear of a panic, and I'll be damned if I want to let go after holding on so long, just when I have got a chance to get out winner. I start back on Saturday morning and may probably stop over in Virginia. Will telegraph Law for letters in case I do.

Yours, W. G. GALIGHER.

No. 4.

SALT LAKE CITY, *Nov. 1st*, 1878.

W. G. Galigher, Palace Hotel, S. F.

DEAR SIR: Having lost what little faith I hope I had in South End Comstock mines when you were here, I write you to know what you can do in regard to reducing your account. If you will deposit enough money with Bank of California (counting stock I hold for your account at quotation of to-day) to make your account good, I will continue to hold them, but I can see no pros-

40 pects of a better market, and don't want to hold these stocks longer as your account now stands. Please let me know what you can do by wire.

Yours truly, T. R. JONES.

No. 5.

SAN FRANCISCO, *Nov. 5th*, 1878.

Mr. T. R. Jones:

Your favor of the first instant at hand, and I hardly know how to answer it. I am beginning to lose faith in the Justice-Alta business, although the mines themselves are looking well and have ore bodies, which, if located at Norcross or Curry, would send those stocks up to $75. I have got a first-class informant who tells me to hold on by all means; that the stock is about all in, and that, irrespective of the merits of the mine, they will make a deal on it. One thing is certain; it is no trouble to sell Justice in small or big lots, and a limit order to sell at prices from one-half to $1 above the market is snapped up quickly, and the low quotations you see are almost always for 10 share lots. I can't comply with your demand to deposit money in Cal. Bank, for I have no money, at least not enough to do you any good, but I have some good West End stock that I don't want to convert at present prices, nor do I want to put them where I can't trade on them, if opportunity offers. I think I might disencumber enough to make your account nearly good—say 50 Mex.—and deposit it with Breckenridge & Yost, so that I could trade on it, sell it out, and buy it back, if I wanted to, and arrange it if you like to so that I could draw in money all over $3,000. I would not care to make such an arrangement through Bank of California, or Wells, Fargo, for it takes too much time and trouble to trade through them. The idea I want to convey is just this: I have got some stocks and some credit, and a very little money, and I can use all together and perhaps get out of my difficulties, but I have not got enough to settle up with everybody at present prices, and in justice to myself, and to my other creditors, I can't afford so sell out any of my stock in trade to make a pre-
41 ferred creditor of you. You have treated me considerately; so have others, and I mean to pay you and every one else every dollar I owe, but just now I have not got enough to go around. I expect to start for Virginia day after to-morrow, and will likely remain there a week unless I have to go over to Utah, a trip I don't want to make just now.

Yours truly, W. G. GALIGHER.

No. 6.

SALT LAKE CITY, UTAH, *Nov. 9th*, 1878.

W. G. Galigher.

DEAR SIR: Yours of the 5th received. I would be glad to hold stock for your account and give you a chance to get out, if I had confidence in the market, but I have not. I fully expect to see S. Nevada sell for much less than present prices within 30 days. Can't you deposit twenty or twenty-five shares of Mexican with Wells, Fargo or Latham & King for my account, and hold the balance of the 50 shares to trade on? I hope I am mistaken about the market, but the Justice is loaded, and you know who gets the chance to

hold stocks when the market is declining and to pay the assessments till it advances again. I would rather be out of South End stocks at present and pay more for them when the long-looked drift in Sierra Nevada has prospected the ore bodies and found it all that the most sanguine hoped for. Please let me know if you can comply with the above request or not. If you do so I will agree to hold your stocks 30 days without advance margins.

Yours truly,

T. R. JONES.

No. 7.

VIRGINIA CITY, NEV., *Nov.* 18, 1878.

Mr. T. R. Jones.

MY DEAR SIR: I received a press copy of your letter to me yesterday, and asked you by wire this morning if you want
42 to credit me the 25 Mexican at market prices. That proposition I can't assent to, for I rely on the advance in North End stocks to get out of my difficulties, and I expect to get a great deal more money than $70 for Mex. before many months. I fully agree with you that the public has got its load, but it took it out of the wrong place. From Overman to Ophir there is nothing but heavy assessments in view, and that is where the dear public made the most of their investment—they will reap the reward. There are, however, very few North End stocks out, and, comparatively speaking, very little Alta and Justice Don't you make any mistake about S. Nevada—it is big—more depth of rich ore than the Bonanzas had and richer ore, better formation, and if all the signs don't fail, it is not now selling for one-fourth of the dividends it will pay. If it is good I am all right; if it is no good, I am in a place to fire it out in plenty time to run. I telegraphed you this morning to convert Justice, Alta, and Tip Top into North Bonanza; the latter will be the next excitement, and is likely to go to 15 or 20 per share. It has a great deal of merit. The cross-cut has found over 20 feet of ore that will pay handsomely to mine, with streaks of two or three hundred dollar rock. They have 60 feet yet to go to the east wall, and face of cross-cut still in ore. The insiders have been taking it in right along; altogether it looks very promising. I suppose order has been filled, as a big lot of it sold to-day under my limit, and I think it will advance enough before New Year's to fix your account up all right. If you want points I won't charge you for information that Imperial looks promising enough to make a deal in, and Exchequer is likely to go up to $11 or $12 within the next 40 days.

Yours, etc.,

W. G. GALIGHER.

No. 8.

VIRGINIA, NEV., *Nov.* 15, 1878.

Mr. T. R. Jones, Salt Lake City.

DEAR SIR: Your favor of the 13th inst. at hand. As you

43 seem to have taken the management of my account out of my hands, you had better continue it, and not bother me any more about.

Yours truly,

W. G. GALIGHER.

No. 9.

SALT LAKE CITY, *Nov.* 15, 1878.

W. G. Galigher, Esq.

DEAR SIR: Your telegram of the 14th received this morning and reads: "Did you fill my order of yesterday? Reply by telegram in cipher to-day." As I did not receive it until this a. m. I could not answer sooner; have just telegraphed you: "Did not act; you will receive letter this morning." I wrote you fully the day your order was received, 13th, and the letter should reach you this a. m. What did you mean by asking Mr. Hanauer to say it was all right? Did you refer to deposit of 25 Mexican to credit you stock account or to North Bonanza mine? I would be glad to make any change that would benefit you if I thought it would not depreciate my security, but I am afraid to hold North Bonanza on margin. If, however, you are of the same opinion when you receive this, telegraph me, and if you have deposited 25 Mexican with W., F. & Co., or Bank of California, for my credit on margin, I will change fifteen hundred dollars' worth of my stock held for your account into North Bonanza, as you may direct, and hold the same in lieu of stock sold.

Yours truly, T. R. JONES.

No. 10.

SALT LAKE CITY, *Nov.* 16, 1878.

W. G. Galigher, Esq.

DEAR SIR: Your telegram of this a. m. received, and I interpret it as follows: "I claim 1,000 North Bonanza. You had better fill shorts." I am not aware of any custom or law by which the borrower can compel the lender to surrender securities and take in lieu thereof such as he may designate, and I will stand by my first decision. In my letter of yesterday I offered to sell $1,500
44 worth of any stock I now hold as security, and invest the same in North Bonanza, provided you have placed twenty-five Mexican to my credit with Wells, Fargo & Co., or Bank of California. If this proposition is not accepted before this reaches you consider it null and void, and I hereby withdraw the same.

Yours truly, T. R. JONES.

No. 11.

Telegraphic report of Bank of California, Nov. 22, 1877, of sale of 100 Ophir for plaintiff, at $36 per share.

No. 12.

Written report by mail of same sale of 100 Ophir.

No. 13.

Telegraphic report of Bank of California of sale of 100 Ophir for plaintiff, Nov. 22d, 1877, at $39 per share.

No. 14.

Written report by mail of same sale of 100 Ophir.

No. 15.

Defendant's written order to plaintiff, dated November 18, 1877: "Sell street or board, good for week, fifty Ophir, limit $37." (Other stocks are named in the same order.)

No. 16.

Nov. 23D.

T. R. Jones, Salt Lake:

Buy for my account 50 Ophir, street or board, this week, limit $35.

W. G. GALIGHER.

No. 17.

SALT LAKE CITY, *November* 27, 1878.

To Latham & King, San Francisco:

Sell the following margin stocks: Twenty-five Alta, 300 Challenge, 220 Justice, 200 Tip Top. (Other stocks named in same telegram.)

T. R. JONES.

45

No. 18.

Telegram from Latham & King to Jones, November 27, 1878, reporting sale of 25 Alta at $7.75; 300 Challenge, $1.25; 200 Justice at $4.40; 20 Justice at $4.50; 200 Tip Top at $1.25; also other stocks.

No. 19.

Written report of same sale by mail, dated November 29, 1878.

No. 20.

Telegram from plaintiff to Latham & King, dated Nov. 29, 1878, directing sale of 300 Challenge; also other stocks.

No. 21.

Telegram from Latham & King, Nov. 29, 1878, reporting sale of 300 Challenge at $1.25, and other sales.

No. 22.

Written report of same sale from Latham & King, dated Nov. 30, 1878.

The foregoing is all the evidence given in the case.

Specification of Errors.

Title of court and cause.

Specification of errors to be annexed to agreed statement herein, as per stipulation.

1. The referee erred in his conclusion of law upon the pleadings that the defendant, in his answer, admits the plaintiff's account and demand stated in his complaint of $6,232.30, with interest thereon,

to be due from defendant to the plaintiff, subject only to reduction for the counter-claims set up in said answer.

46 2. Said referee erred in his findings of fact relating to defendant's first counter-claim, in the following particulars:

a. The evidence is insufficient to justify the second finding that the stocks so bought by plaintiff for defendant were purchased by plaintiff's own money.

b. The evidence is insufficient to justify the finding that there was an implied agreement between the plaintiff and defendant that the plaintiff should hold the stocks so purchased by him for defendant as collateral security "for all moneys due from defendant for such advances, commissions, and interest."

c. The evidence is insufficient to justify the twelfth finding that the North Bananza had reached only $3.50 per share on the 16th day of November, 1878. Said finding is unnecessarily indefinite in stating that "within a few days (meaning after the 13th day of November, 1878,) the North Bonanza advanced to $5 and $5.50 per share—the evidence showing that such advance occurred prior to the 15th day of said November.

d. Said findings relative to defendant's first counter-claim are insufficient and defective in not finding other facts shown by the evidence and material to the decision of said counter-claim, viz: That plaintiff was informed of facts from which the immediate rise in the price of North Bonanza stock was to be anticipated, and the fact was also shown that defendant was in negotiation with a responsible party to whom he would have sold said stock for $5.50 per share; that plaintiff replied to a part of defendant's telegram of November 13th, 1878, at that date and negligently silent on the subject of the order therein contained.

3. The referee erred in his conclusion of law relating to said defendant's first counter-claim in the following particulars:

a. In holding that the supreme court on the former appeal

47 had decided as law of the case that the plaintiff was not bound to obey the order contained in defendant's said telegram of November 13th, 1878, and incurred no liability for failing to comply with the same.

b. In holding that the Supreme Court had on such former appeal decided as of law of the case that said plaintiff incurred no liability to defendant by failing to notify him immediately of the refusal of said plaintiff to comply with the order contained in said telegram.

4. Said referee erred in his findings of fact in respect to defendant's second counter-claim in the following particulars:

a. The evidence is insufficient to justify the first — fourth finding; there was no evidence to justify any finding that defendant was indebted at all to said plaintiff for moneys paid for said Challenge stock.

b. The evidence is insufficient to justify the fifth finding, that the highest price of said stock, before the end of January, 1879, was $3.10 per share.

5. Said referee erred in his conclusions of law in respect to said defendant's second counter-claim in the following particulars:

a. In his first conclusion thereon.
b. In his second conclusion thereon.
c. In his third conclusion thereon.

6. Said referee erred in his finding of facts in respect to the defendant's third counter-claim in this, that the evidence is insufficient to justify the decision that the plaintiff sold 50 shares of Ophir stock on the 22d day of November, 1877.

SUTHERLAND & McBRIDE,
Defendant's Attorneys.

48 *Stipulation for Statement.*

Title.

It is hereby stipulated that the statement on appeal and on motion for a new trial, settled Nov. 18, 1880, in this action after the former trial, is a correct statement of the evidence and proceedings before W. H. Dickson, Esq., referee, on the trial of this cause before him, on the 3d day of November, 1882, except as stated in his report, the date of trial, instructions to the jury, and exceptions thereto, a copy of which is annexed to said referee's report, and to the same the defendant may, at his convenience, append or separately file a specification of errors; and said statement may be read and used on any motion for new trial or on appeal as well from the order or on said motion as the judgment hereinafter made or taken in this matter.

BENNETT & HARKNESS,
Attorneys for Plaintiff.
SUTHERLAND & McBRIDE,
Defendant's Attorneys.

Dated November 23, 1882.
Filed January 18, 1883.

We certify the foregoing as a true and correct transcript of the proceedings in the above-entitled action, to be used on the hearing or appeal from the judgment.

BENNETT & HARKNESS,
Attorneys for Respondent.
SUTHERLAND & McBRIDE,
Defendant's Attorneys.

Filed January 30th, 1883.

E. T. SPRAGUE,
Clerk of Supreme Court.

49 In the Supreme Court of Utah Territory.

THURSDAY, *July* 5, *A. D.* 1883.

THOMAS R. JONES, Respondent,
vs.
WILLIAM G. GALIGHER, Appellant.

From 3rd Dist.

This cause coming on regularly for hearing was argued by Mr.

Sutherland for appellant; Mr. Harkness for respondent; submitted and taken under advisement.

SATURDAY, *August 4th, A. D.* 1883.

* * * * * * *

THOMAS R. JONES, Respondent,

vs.

WILLIAM G. GALIGHER, Appellant.

From 3rd Dist.

This cause having been heretofore argued and submitted, and the court being sufficiently advised thereon, it is now here ordered and adjudged that the judgments of the district court therein be and the same is hereby affirmed, and that respondent have and recover of and from appellant thirty-six and $\frac{50}{100}$ dollars, costs.

50 MONDAY, *June 1st, A. D.* 1885.

* * * * * * *

THOMAS R. JONES, Respondent,

vs.

WILLIAM G. GALIGHER, Appellant.

From 3rd Dist.

In this cause appellant, by his counsel, Sutherland and McBride, prays the allowance of an appeal from the judgment of this court rendered Aug. 4, 1883, to the Supreme Court of the United States, and asks that the amount of a bond for costs thereon be now fixed, and counsel of respondent being present and not objecting, it is now here ordered that the appeal prayed for be and is allowed, and that the amount of bond thereon be and is fixed at $500.00.

51 *Undertaking for Clerk's Costs.*

In the Supreme Court of the United States.

WILLIAM G. GALIGHER, Appellant,

vs.

THOMAS R. JONES, Appellee.

Know all men by these presents that we, A. Hanauer and J. E. Galigher, of Salt Lake City and county, in the Territory of Utah, are held and firmly bound unto James H. McKinney, clerk of the Supreme Court of the United States, in the just and full sum of two hundred dollars, lawful money of the United States, for the payment of which sum, well and truly to be made, we do hereby bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 15th day of June, A. D. 1885.

Whereas lately, at a term of the supreme court of the Territory of Utah, in a suit depending therein between the said Thomas R. Jones, as plaintiff and respondent, and the said William G. Galigher, as defendant and appellant, judgment was rendered on the fourth

day of August, A. D. 1883, affirming a judgment of the dis-
52 trict court of the third judicial district of said Territory against said defendant and appellant for the sum of seven thousand and twenty-eight dollars and costs, $192.85, together with the costs of said supreme court, amounting to thirty-six $\frac{60}{100}$ dollars; and whereas on the 1st day of June, A. D. 1885, the said William G. Galigher, in open court, in the supreme court of said Territory, prayed and was allowed his appeal from said judgment to the Supreme Court of the United States:

Now, the condition of this obligation is such that if the said appellant shall well and truly pay, or cause to be paid, to the said James H. McKenney, his heirs, executors, administrators, or assigns, all such fees as shall accrue to him as clerk aforesaid, and chargeable to said appellant, in the prosecution of his said appeal, — this obligation to be void; otherwise to remain in full force and effect.

A. HANAUER.
J. E. GALIGHER.

Witness as to signature-:
J. E. GALIGHER.
W. R. WAPLES.

53 SUPREME COURT OF THE TERRITORY OF UTAH, *ss:*

I hereby certify that the obligors in the foregoing undertaking are sufficient and amply responsible for the amount specified therein.
Dated June 23d, 1885.

C. S. LANE,
Chief Justice.

[Endorsed:] Supreme Court of the United States. Wm. G. Galigher, appellant, *vs.* Thomas R. Jones, appellee. Undertaking for clerk's costs. Filed June 23d, 1885. E. T. Sprague, clerk.

54 *Undertaking on Appeal to the Supreme Court of the United States.*

THOMAS R. JONES, Plaintiff and Appellee,
vs.
WILLIAM G. GALIGHER, Defendant and Appellant.

Know all men by these presents that we, A. Hanauer, of Salt Lake City, Salt Lake county, Utah Territory, — are held and firmly bound unto Thomas R. Jones, of said city and county, Territory of Utah, in the just and full sum of five hundred dollars, lawful money of the United States, and to his heirs and assigns, for the payment of which, well and truly to be made, we do hereby bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 15th day of June, A. D. 1885.

Whereas lately, at a term of the supreme court of the Territory of Utah, in a suit depending in said court between the said Thomas R. Jones, plaintiff and appellee, and the said William G. Galigher, defendant and appellant, a final judgment was rendered by the said

court on the fourth day of August, 1883, affirming a judgment
54½ of the district court of the third judicial district of said Territory against the said defendant for the sum of $7,028.00 *dollars* and costs, amounting to $192.85, together with the costs of said supreme court, amounting to thirty-six $\frac{07}{100}$ dollars, and the said William G. Galigher having prayed for and been allowed an appeal by the said supreme court of said Territory to the Supreme Court of the United States from said final judgment, and the undertaking thereon having been by said court fixed at the said sum of five hundred dollars:

Now, therefore, the condition of this obligation is such that if the said appellant shall prosecute his appeal to effect and answer all costs and damages which may be adjudged against him thereon in case he shall fail on his said appeal and said final judgment be affirmed, or to the extent to which it shall be affirmed, or in case said appeal shall be dismissed, then this obligation to be void; otherwise to be and remain in full force and effect.

A. HANAUER.
J. E. GALIGHER.

Witness- as to signatures:
J. E. GALIGHER.
W. R. WAPLES.

54¾ TERRITORY OF UTAH, *ss:*

I hereby approve the foregoing undertaking on appeal to the Supreme Court of the United States and certify that the same is sufficient, and that the sureties thereto are amply responsible for the amount specified therein.

June 23d, 1885.

C. S. LANE,
Chief Justice.

Endorsed: William G. Galigher, appellant, *vs.* Thomas R. Jones, appellee. Undertaking on appeal to U. S. Supreme Court. Filed June 23d, 1885. E. T. Sprague, clerk.

55 ° *Assignment of Errors.*

Supreme Court of the United States.

WILLIAM G. GALIGHER, Appellant, *vs.* THOMAS R. JONES, Appellee.

Now comes the appellant above named, by his attorneys, Sutherland & McBride, and upon the record and proceedings herein assigns the following errors:

First. The findings are defective in that they nowhere show whether the relation of the plaintiff, Jones, was that of an agent of the defendant, Galigher, in the purchase and sale of the stocks out of which the alleged indebtedness on either side arose, and said relation was a material issue.

Second. The findings are defective in this: The referee finds that on the 13th of November, 1878, the defendant ordered the plaintiff to sell certain stocks then held by him and buy a certain other stock

at a limit of $2.75 per share; that the plaintiff received said order in time to have obeyed the same on that day, and that the stock ordered purchased could have been purchased for a less price
56 than that limited, and that the plaintiff refused to comply with the directions or to notify the defendant of that refusal by telegram, but wrote a letter, which, in due course of mail, was received about noon of the 15th of November. Under this state of facts the twelfth finding of fact, in stating "within a few days" without showing at what time or on what day the said stock did advance to $5.50 per share, when the evidence showed specifically that it was between the date of the defendant's order to plaintiff on the 13th of November, 1878, and the receipt of plaintiff's letter by mail on the 15th following. The precise time was in issue and was material, and the evidence was before the referee upon which to make the finding.

Third. The findings of fact are further defective and insufficient in this: The plaintiff was informed of facts from which the immediate rise in the price of North Bonanza stock (the stock ordered to be purchased) was anticipated, and the fact was shown in the
57 evidence that the defendant was in negociation with a responsible party to whom he could have sold said stock for $5.50 per share; that plaintiff replied to a part of defendant's telegraphic order of Nov. 13th, 1878, and remained wilfully and negligently silent on the subject of the order, none of which facts, though shown in evidence and material in the issue, were found.

Fourth. The referee erred in his conclusion of law, that the defendant, by the answer, admitted that there would be due the plaintiff the amount claimed in the complaint were it not for the counter-claims set up the answer.

Fifth. The referee erred in his conclusion of law. It is stated as the "third" conclusion of fact that there was an implied agreement between the plaintiff and defendant, that plaintiff should hold the stocks so purchased by him as collateral security for all monies due him for advances. No facts are stated which justify such a conclusion, and none a- found in the evidence. An implied agree-
58 ment is a conclusion of law from facts, and no facts are stated to support this conclusion, and none exist.

Sixth. The referee erred in his conclusion of law relating to the defendant's first counter-claim in this: In holding that the supreme court of Utah Territory on the former appeal had decided as "the law of the case" that the plaintiff was not bound to obey the order of defendant, dated the 13th of November, 1878, and the judgment of the supreme court of Utah erred in affirming said finding, because it was not the court of last resort in this action, and its decisions neither bind the referee nor itself, and said decision on the former appeal was against law.

Seventh. The referee erred in what he calls the "fourth conclusion of fact" on the second item of the defendant's counter-claim in this: The indebtedness of the defendant to the plaintiff there stated to exist is the result of finding erroneously that the plaintiff was
59 not liable to defendant on account of the transaction in November previous, and if this were error, as we claim, this

finding has nothing to support it, and the contrary is true. Said finding is without support further in any of the facts found; that the stock alluded to was held as collateral security for any indebtedness of defendant; if he was not indebted to the plaintiff at that time, there was nothing to be secured; if he was indebted there is no finding of facts to support the finding or conclusion that the plaintiff held them as collateral.

Eighth. The sixth "conclusion of law" is against law.

Ninth. The last conclusion of law, that the plaintiff is entitled to a judgment for the sum named, is agaist law, because the defendant was entitled to a judgment in his favor.

We therefore pray for a reversal of the judgment appealed from.

SUTHERLAND & McBRIDE,
Att'ys for Appellant.

60 Filed Sept. 15th, 1885.

E. T. SPRAGUE, *Clerk.*

61 TERRITORY OF UTAH, }
County of Salt Lake, } *ss:*

I, E. T. Sprague, clerk of the supreme court of said Territory of Utah, in pursuance of an appeal allowed by said court, do return annexed hereto a transcript of the record and proceedings, bond for costs, and assignment of errors in and of said court in the cause of Thomas R. Jones, respondent, *vs.* William G. Galigher, appellant, to the Supreme Court of the United States; and I hereby certify that said annexed transcript of said record, proceeding, bond, and assignment of errors is a true, full, correct, and complete copy of the several originals thereof on file or of record in my office, and that no opinion in said cause has been filed.

Witness my hand and the seal of said supreme court of Utah Territory at Salt Lake City this 16th day of September, A. D. 1885.

[SEAL.] E. T. SPRAGUE,
Clerk of Supreme Court of Utah Territory.

Endorsed on cover: Utah Territory supreme court. No. 1023. William G. Galigher, appellant, *vs.* Thomas R. Jones. Filed October 6, 1885.

[redacted]

APPELLANT'S BRIEF

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

finding has nothing to support it, and the contrary is true. Said finding is without support further in any of the facts found; that the stock alluded to was held as collateral security for any indebtedness of defendant; if he was not indebted to the plaintiff at that time, there was nothing to be secured; if he was indebted there is no finding of facts to support the finding or conclusion that the plaintiff held them as collateral.

Eighth. The sixth "conclusion of law" is against law.

Ninth. The last conclusion of law, that the plaintiff is entitled to a judgment for the sum named, is agaist law, because the defendant was entitled to a judgment in his favor.

We therefore pray for a reversal of the judgment appealed from.

SUTHERLAND & McBRIDE,
Att'ys for Appellant.

60 Filed Sept. 15th, 1885.

E. T. SPRAGUE, *Clerk.*

61 TERRITORY OF UTAH, } *ss:*
County of Salt Lake, }

I, E. T. Sprague, clerk of the supreme court of said Territory of Utah, in pursuance of an appeal allowed by said court, do return annexed hereto a transcript of the record and proceedings, bond for costs, and assignment of errors in and of said court in the cause of Thomas R. Jones, respondent, *vs.* William G. Galigher, appellant, to the Supreme Court of the United States; and I hereby certify that said annexed transcript of said record, proceeding, bond, and assignment of errors is a true, full, correct, and complete copy of the several originals thereof on file or of record in my office, and that no opinion in said cause has been filed.

Witness my hand and the seal of said supreme court of Utah Territory at Salt Lake City this 16th day of September, A. D. 1885.

[SEAL.] E. T. SPRAGUE,
Clerk of Supreme Court of Utah Territory.

Endorsed on cover: Utah Territory supreme court. No. 1023. William G. Galigher, appellant, *vs.* Thomas R. Jones. Filed October 6, 1885.

Office Supreme Court U. S.
FILED.
MAY 5 1888
JAMES H. McKENNEY.
CLERK.

APPELLANT'S BRIEF.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

WILLIAM G. GALIGHER, APPELLANT,

vs.

THOMAS R. JONES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

JNO. R. McBRIDE,
ATTORNEY FOR APPELLANT.

Star Print, Salt Lake City.

In the Supreme Court of the United States.

WM. G. GALIGHER,
Appellant,
vs.
THOMAS R. JONES,
Appellee.

BRIEF AND ARGUMENT OF APPELLANT.

This cause has been twice before the Supreme Court of Utah Territory. The first hearing in that court was on appeal from a judgment in favor of the present appellant (the defendant), and an opinion by a majority of the court was then filed, and is reported, 3 Utah Reports, page 56. On the retrial then ordered a judgment was rendered for the plaintiff (Jones), and upon appeal was affirmed. No opinion was ever filed, and the present appeal is from the decision last made.

The record shows the affirmance of the judgment of the District Court by a divided court, and we can only gather the grounds of the decision by referring to the opinion above cited. This will account for the absence of any opinion in this record of the court below. None has been given.

On the first trial of the cause in the District Court of Utah, the judgment awarded the defendant a recovery of some

$5,000 and costs. On appeal, as already stated, this judgment was reversed, and a new trial ordered. The second trial was had before a referee, and the testimony taken at the first trial, having been stenographically reported, was by stipulation used at the second, and is found in this record in the "Statement" on Motion for New Trial.

At the second trial the referee, taking the place of a jury, made his findings of fact and law, and reported judgment for the plaintiff as shown in this record. From this judgment the defendant—appellant here—appealed to the Supreme Court of the Territory, where the same was affirmed, and from this judgment of affirmance the cause is now appealed to this court.

The Assignment of Errors in this court is found on pages 36-7 of the Transcript.

Our first objection is that the referee failed to find on a material issue made in the pleadings and vital to any correct decision of the cause. (Pages 36-7, Folio 55 of Transcript.) The action was for money loaned and advanced to defendant at his request, and for interest and commissions due to the plaintiff, as a stockbroker.

The defense was a denial of any indebtedness, and affirmtive allegations that the matters in controversy arose out of the following state of facts, in substance:

That the plaintiff was a banker doing business in Salt Lake City at the time stated, and that the defendant was a customer. That the defendant was engaged in dealing in mining stocks sold at the "San Francisco Mining Stock Exchange," and employed the plaintiff *as his agent* to buy and sell stocks on his orders, using his credit in plaintiff's bank to operate upon.

That as sales were made and money realized, he directed the results to be credited to his bank account, sometimes drawing out money and at other times making deposits of money derived from other sources, as well as from stock sales. That sales of stock, re-investments in other stock, credits, etc., were made on orders from defendant, and not otherwise.

That before this controversy arose, the defendant went from Salt Lake City his residence, and plaintiff's place of business, to Virginia City, Nevada, where the mines were located in the

stock of which he was operating; that he left in plaintiff's hands, as his agent, certain specified stocks, worth several thousand dollars. That being desirous, from the knowledge which inspection of the mines gave him, to sell this stock, and invest the proceeds in a certain other stock, with a view to profit, he sent a telegram to the plaintiff on November 13th, 1878, in time to make the transaction on that day, directing the plaintiff to make the sale and purchase indicated. The plaintiff received the telegram and acknowledged it, but did not follow the order, or give notice to the defendant that he refused to do so, except by letter, which was not received until several days had elapsed. That shortly after, the plaintiff, without orders, sold the stock he had been ordered to sell and did not, at a loss of some $1200, from its value at the time of the order, and that the defendant by reason of the order not being obeyed in the purchase of the stock which the plaintiff was directed to purchase, lost a further sum of some $6,600, the amount of the advance in the price of that stock, occurring immediately after the order was given. These losses were made the basis of a counter-claim by the defendant upon the plaintiff of some $8,000.

A second defense and counter-claim on behalf of defendant arose thus: That about the same time the defendant had a certain other stock in the plaintiff's hands, as his agent, known as "Challenge" stock, and that about the 28th of November, 1878, without order and without plaintiff's consent, the plaintiff sold the same and converted the money, to his, defendant's, damage in the sum of $2800, which is set up as a counter-claim.

Other items of counter-claim are also set out in the answer, but as the facts are found against the defendant, and we cannot review those facts here, we omit further reference to them.

The affirmative matters set out in the answer, being denied by the statute for the plaintiff, (we have no replication in pleading). The question of the *relation* of the parties to each other became vital and essential. It is alleged in the answer that the defendant and the plaintiff stood, first in the relation of banker and customer. On that issue the finding is clear enough as to the plaintiff (see first finding, page 5, transcript), but there is no finding as to the allegation that the defendant had an account

as alleged although the evidence on that subject was without any contradiction. In fact, it will be seen from an examination of the proofs, the facts were taken for granted. Both the plaintiff and defendant testify to the defendant having "an account" in the bank during all this time, and that it has never been closed except by a "balance statement." The finding which was made incomplete and only partial as it stands, is totally immaterial to any purpose in this case. The finding simply that the plaintiff was a banker, really not controverted by him at any time, without finding whether the defendant was a customer and kept an account, was immaterial. That the defendant kept and had an account with the plaintiff was abundantly shown in the proofs, and was equally admitted, and yet no finding was made on this point, which was material.

On the question directly put in issue by answer, the relations of the plaintiff and defendant in *the purchase and sale of these stocks*, the findings are entirely silent. This was the real issue in this case. If the finding on the question of banker and customer could be regarded as sufficient, still it throws no light on the real question at issue. The relation of banker and customer is that of debtor and creditor, while the relation of principal and agent is entirely a different one.

That there was ample testimony upon which a finding that the plaintiff, in the purchase and sale of these stocks, acted as the agent of the defendant, an inspection of the proofs in this record shows; but if there was no proof of the fact alleged in the answer, a finding should have been made, because the parties are entitled to a finding on every material issue.

Swift vs. Canavan, 52 Cal. 417.
Taylor vs. Reynolds, 53 Cal 686.

No judgment can properly be given until every material issue has been first determined one way or the other.

The fact is, and the proofs in this record clearly establish it, that as a banker, Jones, the plaintiff, received deposits of money, and opened an account as such with the defendant. That when defendant entered upon these stock purchases, he ordered Jones to make purchases of stocks, and he either drew on the bank account to meet the purchases or directed them to be

charged to it. That as moneys were realized from sales they were credited to this account; that sometimes money was drawn by the defendant out of the bank.

That in the stock business the plaintiff acted as any agent for his principal; and in the bank account as a banker with his customer, is we think too clear for dispute on the evidence. But whether this be true or not, we had the right to have it distinctly settled, because an agent's duties and rights are entirely different from those which belong to a banker—the banker is a master, an agent is a servant. If he undertook to buy and sell stocks for the defendant on his order—and the manner in which he performed the duty indicates, without affirmative proof, what the contract between the parties was, the referee should have found whether the allegation, that he acted as an agent, is true or not.

Jones, the plaintiff, says there was no written contract between them. (Page 21-2 Transcript). Galigher relates (page 9, folio 13, 14, Transcript), how the business as to the stock sales began. He says the business began (he already having a bank account with plaintiff). Nothing was said about "margin" or personal credit. Galigher was a man of means and large business, running the "Spanish Mine" in Utah, and regarded as abundantly able to meet any demands against him. That his personal credit was all that either of the parties thought of at the time is clear. Jones asked no security—*but stipulated for interest*—this Galigher testifies and Jones admits. Galigher says, "sometimes he, Jones, would call on me for money, which I would put up, and sometimes I would draw on him." (Page 9, folio 14 Trans.) Meaning on his bank account. Subsequently he relates (folio 15) that he had a talk with Jones and the latter said "I have never bothered you for money so far, and I will not do so; *you are good enough for me.*" He then states that when he went to Virginia City in the fall of 1878, the amount of stocks in Jones' hands at the prices then prevailing, were nearly sufficient to make, if sold, his account in the bank "good." About this time Jones began to call for money, and Galigher ordered him to sell some of the stock and apply the money on the account. Later on

after a return to Salt Lake, Galigher went back to Nevada to operate more understandingly, and then Jones fearing a "breakdown," and perhaps learning that Galigher's fate depended largely on the result of the stock market, in which he (Jones) had little confidence, concluded as Galigher puts it in his letter to take "the management of my (his) account out of my (his) hands." (Folio 42-3, pp. 29, 30, Trans.)

Jones does not deny what Galigher said on the stand as to his saying, *"you are good enough for me,"* and yet when he begins to distrust Galigher's success, he not only does "bother" him for money, but undertakes to administer on his estate as if it were not Galigher's, but his own.

It is true that Jones says as a witness, (page 22, folio 31) "the stocks were always held as security," but he did not swear that *any such agreement* was had between himself and Galigher, or that there was any understanding of the kind *between them*. On this condition of the facts, then what was their relation to each other? We think without question the plaintiff was the agent of the defendant, for the purchase and sale of these stocks, and bound by the duties and obligations of such relation.

It is evident that the referee who tried this cause and reported this judgment, took the same view of these facts, for he expressly finds on the first counter-claim in obedience to the intimations in the decision of the Supreme Court of Utah, as given on the decision of the first appeal, and its supposed binding authority as "the law of the case," while on the second counter-claim, for the conversion of the "Challenge" stock, he finds for the defendant. The principle that would bind the plaintiff to account for the "Challenge" stock, because sold without notice and without order equally applied to the conversion of the "Alta," "Justice" and "Tip-top" stock sold against orders shortly before. A mere glance at the facts surrounding the two transactions, shows that the principle involved in the one instance, equally applied to the other, and yet the findings exculpates the plaintiff in one, and holds him responsible in the other. The referee relieving himself from responsibility for the inconsistency, by saying (page 6, folio 8, Transcript,) "the law applicable to these facts (the first counter-claim) and the rights of

the parties thereon was settled, I take it, by the decision of the Supreme Court on said appeal." When the referee came to the second counterclaim, unembarrassed by the decision of the Supreme Court of Utah as he believed, he adopted the law as contended for by the defense—that a sale of stocks belonging to the defendant, *without orders and without notice*, was a conversion which entitled the defendant to recover their value, and he assesses damages in defendant's favor thereon.

This view on the first counter-claim we take it was clearly erroneous.

The rule that a previous decision becomes "the law of the case" applies only to the decision of the court of *last resort.*

Lawrence vs. Ballou, 37 Cal. 518.

Whether the Supreme Court of Utah, because it is an intermediate court of appeal, can be regarded on a re-trial ordered by it, as having declared the "law of the case" so as to bind the tribunal before which such re-trial is had, is not important; in any event, *this court* will review the correctness of the decision, whether made by the trial court in obedience to the supposed authority of its superior or by the Supreme Court of Utah. As the decision of the referee stands, he states distinctly that he excludes from consideration the evidence in regard to damages claimed by the defendant under the first counter-claim, and the result is a finding against the defendant. It is not an erroneous finding on the facts although embraced in the findings of fact, but an error of law in ruling upon the admissibility of evidence.

This ruling is erroneous in another respect:

The Supreme Court of Utah did not, on the appeal at the former hearing, settle the law of the case, as to whether the plaintiff had on the facts of the case, a lien on the defendant's stocks in his hands, nor that the plaintiff was guilty of no negligence in not notifying the defendant of his refusal to comply with the order to sell of Novembr 13th, 1878. There had been a general verdict for the defendant by a jury, and the question for the Supreme Court was, as to whether the plaintiff was entitled to a new trial. The Supreme Court had no power to *pass on the facts*, and could not determine the effect of proofs. That was a

question for the jury on the re-trial, and therefore a question for this referee. The case was ordered to be retried, and the facts in issue were as much in controversy on the second trial, before the referee, as if the case had never before been tried. The Supreme Court of Utah could not declare, as law, any conclusions in the case reached by it in the former hearing, which depended upon the facts, which were to be re-tried.

In that decision the Supreme Court of Utah did say (Folio 9, page 6, transcript) in referring to the defendant's order to sell stocks and purchase "North Bonanza" dated November 13th, 1878, that "this order in effect directed the plaintiff to dispose of certain securities held by him, and take another in place of them," but this was an indirect attempt to find a fact, or the assumption of a fact, in issue which was to be retried, and not before that court. Whether these stocks were *held as security*, depended on the agreement of the parties, or the facts surrounding the transaction, and was one of the issues to be determined on the evidence—not by the court sitting to decide questions of law, but by the jury, or tribunal to which the case was remanded for retrial. If the attempt was made by the Supreme Court to *try the question of fact*, it was wholly outside the case submitted to it. It had no authority to find on a part of the issues of fact on appeal, and thus bind the jury who might re-try the case on that issue, and allow it to pass on the remainder. Such an effort to bind the tribunal below would be nugatory. Whether the Supreme Court of Utah could, in a law case, determine the effect of testimony addressed to a jury who must have found, in order to render the verdict they did, that the facts proved by abundant testimony, Jones had for two years bought and sold stocks on defendant's orders, on his account, and had not in all time ever done otherwise, except in one instance, which the defendant promptly repudiated; there was no evidence of an understanding between the parties, that he was bound to obey such orders, and say, that there was no evidence that the plaintiff was required to obey such orders, is hardly a question to be argued here. According to the construction put by the referee on that decision of the Supreme Court of Utah, that court is made first, to determine a fact, which the decision ordered re-tried, in order

to lay down a rule of law, which had no application to the previous facts of the case. If such a decision by the Supreme Court of Utah was made, it was undoubted error; if it was not made, the referee in assuming it to have been made, committed error. The jury, or a referee trying a cause, must find the facts in issue, and to evade a finding of fact on the assumption, true or false, that the higher tribunal had prejudged the evidence, is error.

The referee was, by the submission of the case to him for a re-trial bound to find on all the issues of fact which were referred to him, and while the "law of the case" as laid down by the supreme court may have been binding; his duty *was to find the facts* and apply the law, and any failure to do so was error. Even if the decision of the supreme court on the testimony was of such a character as bound the referee to find in accordance with it, it could *not relieve him from the necessity of making any findings of facts at all.* He was obliged to make the finding, not in the form of a mere conclusion of law, but such a finding as responded to the issues in the pleadings.

Campbell vs. Buckman, 49 Cal. 362.
Speogle vs. Luse, 51 Cal. 415.

By substituting the alleged views of the supreme court of Utah, upon the questions of fact, the referee instead of deciding these questions himself, as he was bound to do, takes shelter under the decision cited, which if correctly interpreted is erroneous, and if not, makes his decision equally so.

We therefore urge here, that in failing to find upon the relations of the parties, in the purchase and sale of these stocks—a vital issue made by the pleadings—the record shows error.

If a finding be made which is not supported by the evidence, the error can be corrected by a motion for new trial, but a failure to find can only be remedied by an appeal for want of a finding, hence the form of this assignment of error.

But there is another, and we think equally conclusive objection to the judgment reached by the referee on this first counter-claim.

What he denominates the third "conclusion of fact," on page 5 of the record, is not a finding of fact but a conclusion of law simply.

It is as follows: "That there was an implied agreement between plaintiff and defendant, that plaintiff should hold the stocks so purchased by him as collateral security, for all moneys due him for such advances, commissions and interest."

We have assigned for error that this is a "conclusion of law," and not a fact.

The difference we apprehend between an express and an implied contract is that an express contract *is a fact*, which only requires a statement of its terms, while an implied contract is a conclusion of law *drawn from facts*, either admitted or proved, which must be stated. An implied contract is one which the law draws, as a conclusion, from certain facts which are first established, and these must be first found to exist or no contract can result. But the finding in this case is simply to the effect that there was an "implied contract," without stating any of the series of facts necessary to establish such a conclusion. A judgment based on such a finding has nothing to support it.

The facts in the record, as we claim, establish the opposite. These facts already alluded to are: That the relations between these parties originally were banker and customer; that while this relation existed, the defendant ordered the purchase and sale of stocks, by Jones, who by his relations to persons operating on the San Francisco Stock Exchange, made him a convenient person through whom to transact such business. That the defendant directed such purchases to be charged to his bank account, and credits on sales to be credited thereon, and that no direct formal contract was made. That for two years this course of business was continued, the plaintiff sometimes depositing money, and sometimes drawing money out of his account.

Nothing was said as to whether the plaintiff was to purchase the stock in his own name or that of defendant, and defendant never knew in whose name they were carried, and supposed, in neither his or plaintiff's, in such business the custom being to have the stock actually carried in the name of some trustee at San Francisco. That during all this time pur-

chases, sales and re-investments in other stock were made on orders given by defendant, and on a deviation from that, in one instance, it was repudiated promptly. That the plaintiff told defendant on one occasion—the only one when they had a "close talk" as plaintiff puts it—that "*he (defendant) was good enough for him.*" That the rate of interest and commissions were stipulated for on advances, but not a word said about "margin," "collateral" or other "security." That when stocks were bought they were charged to plaintiff in his bank account, and when sold the proceeds credited. That the plaintiff never refused to obey an order of defendant to either buy, or sell or re-invest, until the 13th of November, 1878, and then for the first time assumed control of the stocks in his hands. It further appears that the plaintiff had a class of clients in the stock business with whom he had written contracts by which they agreed to put up a certain "margin" of the price of stocks ordered by them, and "keep it good," in default of which, he was authorized to control the stock purchased; but no such contract or uuderstanding, verbal or written, ever existed between these parties. This record shows these facts as we claim.

In the absence of express agreement between parties the "course of business," the way in which it is transacted, especially where it is a long continued business, is usually the means by which the courts ascertain the limits and conditions of a contract. Applying that rule in this case, we find an invariable "course of business" between these parties, lasting for over two years, and in no instance was there in all this time any claim ever made by this plaintiff, that he had any personal interest in, or control over, the stocks bought on the defendant's order. The following cases are instructive in construing such contracts:

Mosse vs. Salt, 32 Beav. 269.

Clancarty vs. Latruche, 1 Ball & B., 420.

The custom of a merchant or manufacturer is presumed to be known to those who are in the habit of dealing with him; and to form part of the contract.

Meech vs. Smith, 7 Wend, 315.

Rub vs. McAllister, 8 Wend, 109.

Backus vs Min, 73 Cal., 231.
15 Pac. Rep., 371.

From this state of facts, which is either admitted or clearly established by the evidence, is there any basis for the conclusion of law "that an implied agreement" existed that the plaintiff should hold these stocks as collateral security for all moneys due plaintiff for advances, etc.? No ingenuity can evolve from them such an implied agreement. When the plaintiff said to defendant as testified to by him without contradiction, "I have never bothered you for money, and I never will, *you are good enough for me*," does not the pretense of an *understanding* for collateral security on the property purchased, disappear wholly from this contract? When the referee finds as a fact that the plaintiff bought these stocks with his *own money*, how can the finding be reconciled with the charging of the purchase price to the defendant in the account? Can a person eat his cake and still have it? Could Jones use his "own" money to buy the stocks, and yet charge it to the defendant as he testifies he did?

When the money was paid for the stocks it was Galigher's money, loaned to him by the plaintiff, else the plaintiff would have no cause of action for it now. The finding shows what confusion existed in the mind of the referee in trying to adjust the supposed views of the Supreme Court of Utah, as announced in the prior appeal, to the actual facts, as they appeared in evidence before him. Whatever the reason which led to those findings, an "implied agreement" from facts there did not exist, and that the plaintiff used his *own money* to buy the stocks, when the plaintiff's "monthly statements" in the record showed that every dollar had been religiously charged to the defendant in his bank account, it is certain they are without the slightest support either in the facts or the law, and they are so inconsistent with themselves that we think no judgment ought to stand which depends upon them. If the plaintiff used his own money where is the basis of this suit? In such a case there would be no debt to sue for, and the defendant could not be said to owe, for what he did not receive. In order to create the debt sued for, he must either have received the money or the stocks, whilst the finding shows

he never had either. This last finding would reduce this arrangement to an executory contract, such in some respects as was found to exist between the parties in Covell vs. Lend, 135 Mass., 44, and Galigher not having complied with his agreement to pay for the stocks, never became the owner of them or of any interest in them. If this finding is correct, then the plaintiff never had a cause of action, and having used his "own money" to buy stocks for himself "in his own name," the title to which he took in his own name must go out of court "hoisted on his own petard."

The action of the plaintiff would be, if he be held to have any, against the defendant, an action for breach of the contract to purchase, and for damages. In no view that can be taken of it, can this judgment stand on these findings of fact, for if the defendant never received the stocks, as he did not if this second finding be true, there could be no "implied agreement" to pay for them either as a fact, or as a legal conclusion, or to secure any debt alleged to have been contracted in their purchase.

Pursuing this point more closely we discover that the findings show this condition of facts upon which the plaintiff's judgment rests.

1st.—That Jones, the plaintiff, a banker in 1877-8 (by a *lapsus pennæ* stated to be 1878-9) bought and sold mining stock for defendant upon his order and request—that the purchases were made with plaintiff's own money, and that he was to receive from defendant interest on advances of money, and commissions on purchases and sales.

(First and Second Findings, page 5 of Record.)

2d.—That there was an "implied agreement" that the plaintiff should hold the stocks purchased by him for defendant as collateral security for advances made, and interest and commissions.

(Third Finding, page 5, do.)

3d.—That *all the stocks* purchased were purchased by the plaintiff *with his own money*, in *his own name* and *the title* taken in his *own name*.

(First and Fourth Findings, Record.)

4th.—That the defendant did not pay for the stock or interest agreed.

(Ninth Finding, page 5.)

(The other findings, except the tenth, relate to the defenses, and are not material to the point now being considered.)

Saying nothing of the defenses, we cannot conceive how a judgment *for moneys "advanced and loaned,"* can be supported on such findings of fact.

It is found that the plaintiff used his "own money" bought stock "in his own name," took "the title in his own name," and finally sold them—not in obedience to any order from the defendant, but against orders—at a loss, (Tenth Finding) and now seeks to recover the money paid for them, and interest and commission, etc.

The plaintiff has awarded to him a judgment for moneys advanced to defendant, when the findings show he did not advance money to defendant, but bought with his own. If he advanced his own money, and bought stocks in his own name, and took and held the title himself, as these findings show, and sold them, not for defendant—and the findings show he refused to sell on defendant's request—and did sell on his own motion; upon what principle can this purchase price be called an advance or loan to the defendant? The defendant never had the money—so say the fingings—he never had the stock—so say the findings—it was not sold on his order—the findings show a refusal to do so, and the proceeds went into the plaintiff's pockets, he, defendant is not found to have received them. The defendant had neither money, stock or proceeds—if these findings are true. Can he be held indebted for money he never received, or for the price of stock that he never owned, either by reason of having paid money on it or having title to himself, on proof that it was purchased for him, but never paid for or delivered to him. At no stage in the transactions, according to these findings, did the defendant have any interest in the money paid for the stocks, any interest in or title to the stocks when purchased, or in the control or disposition of them finally, or receive anything from them.

A vital defect of these findings consists, in addition to those already suggested, in not disclosing anywhere the terms of the contract of the parties. A general finding, such as is made in the second finding (page 5 record) that the plaintiff bought and sold mining stocks for defendant upon his order and request, without disclosing *how* the business was to be done, the particulars of the orders, and what was done in compliance, leaves the whole subject too indefinite for legal resolution. When this finding—professedly the statement of an express contract of which it evidently was only a part, is followed, as it is, by the "third finding, to the effect that there was an "implied agreement," that the purchases so made, as found, with the plaintiff's "own money, (after stating an express contract that he was to advance to defendant for such purchases, and be paid commissions and interest on sums advanced) resulted in purchases with his own money," "in his own name ;" and yet the stock so bought were to be held as collateral to defendant's debt for advances; the liens and terms of such a contract, or series of contracts, become so confused between the agreement and the performance, between what was agreed and what was implied, what was understood should be done, and what in fact was done, that the court must be more than wise, and the lawyer more than learned, who can say *what the contract is*, which is being enforced.

It must be evident that all of the contract, or contracts, has not been spread before the court, and that a judgment rendered on such findings as we have, cannot be the result of anything better than "a guess" at what is just to these litigants. That our client, this defendant, has suffered a loss of many thousands of dollars by reason of the conduct of the plaintiff even the findings do not conceal, and the evidence fully discloses. That the plaintiff has lost some of the money employed in these transactions is equally evident; but in adjusting these losses between them, nothing short of a full finding, showing all the facts, fully and completely, can enable the tribunals of justice to decide fairly and justly between them. The Supreme Court of Utah in assuming to pass on certain questions of fact, which only properly belonged to a jury, at the trial, is the responsible

author of the confusion which has followed, and the referee deeming himself excluded from making findings on issues in the pleadings, has intensified this manifest error.

Having said that we regard the errors committed by the Supreme Court of Utah in its decision on the first appeal as the origin of the errors committed by the referee on the re-trial and affirmed in this record, in the absence of any opinion by it herein, it may aid this court in the investigation to give some attention to that original decision. The referee quotes from it in this record, and the decision is reported in full—Utah Reports, Vol. 3, page 56 *et seq.*

To comprehend fully the decision the positions of the opposing parties should be stated.

The plaintiff had brought his action for money loaned and advanced and for interest, and asked judgment for an unpaid balance on the account.

The defendant denied any indebtedness and set up a counter-claim growing out of certain transactions relating to the purchase and sale of stocks, alleges that the plaintiff was his banker with whom he had an account; that at certain dates the defendant employed him as agent to buy and sell mining stocks on his order therefor providing for the purchases, by charges in his account in bank, and crediting the account by the proceeds of sales. That in the course of the business he gave orders frequently for sales and re-investments, etc. That in November, 1878, being then in Virginia City, Nevada, he ordered the defendant, as his agent, by telegram, to sell a certain lot of stocks then belonging to him and to re-invest the proceeds in a certain other stock named; that the plaintiff received the order but neither complied with it, or gave defendant notice of his refusal, except by mail, which was too late to prevent the injury resulting, which was a loss to defendant of some $6,000; that in a few days after, the plaintiff, without orders and without notice, sold the stocks defendant had ordered him to sell, at a price some $1,200 below the price they would have brought if sold when defendant gave his order to sell, making a total loss to defendant on this lot of stocks, of some $8,000, which he pleaded as a counter-claim against any demand of the plaintiff.

At the trial in the District Court, and on the appeal from a judgment for the defendant therein, the position of the plaintiff was: That the plaintiff was a broker advancing money to his customer in the purchase of these stocks, and that as he advanced money and held the stocks in his own name, he had a lien on the stocks for his advances, of such a nature that at any time there was a balance in his favor, he could either refuse to sell, and re-invest in other stocks, or sell and apply the proceeds to the discharge of his advances.

The question which was discussed on that appeal was whether the relations of the parties in these stock transactions was such as to give the plaintiff a *lien* upon the stocks left with him for advances due him, and permit him to refuse to sell and re-invest when directed to do so, or to sell without orders, to reimburse himself when he chose to do so. The decision was by a divided court, and shows, we may say, with all due respect, a singular example of the crude conception which even a court of last resort, in many cases, may sometimes have of its functions.

Called upon to determine simply questions of law involved in certain instructions given by the court below to the jury, which tried the facts, the Supreme Court in its decision, went into the facts, as if it were empowered to try the case upon them, and although it ordered a new trial, expressed opinions as to the effect of the proofs, which it was clearly incompetent and improper for it to do. To such an extent was this done, that the referee in this case regarded a *question of fact*, in direct issue on the pleadings in the case, referred to him to try, *as settled* by the decision of the Supreme Court, and failed to make any finding upon it whatever. We refer to the question of agency involving the relations of the parties already discussed.

We admit the right and the duty of that court to lay down the law on any given state of facts, but we deny its right to pass upon a disputed question of fact, so as to prevent, on a retrial, a re-examination and determination of the fact upon the testimony submitted. Here is an example of its treatment of the case: "The plaintiff and defendant both say in their testimony that the plaintiff held the stock as security for the pay-

ment of the account"—meaning the defendant's account in the plaintiff's bank.

Now the fact was (the identical testimony of the two parties at the first trial, is in this record) the opposite. Let us see on what this assumption is based. And first, we remark that there is not one word in the testimony to show that the plaintiff ever credited the defendant in his account with the value of stocks held in hand. The defendant got his credit in the account *when stocks were sold*, and the money realized, yet the court says, "it is apparent beyond controversy (Page 613, Utah) that upon the purchase of stock for the defendant by the plaintiff, with his own money, *credit was given* upon the stocks held for the plaintiff." There is not a syllable of the testimony to sustain this assumption. But, to return to the statement that the stock was held as security which the court says was admitted by both parties.

Galigher, the defendant, (Page 24, Folio 23-4) testified in answer to the question: "Did you understand that he (Jones) took your personal credit alone without reference to the stocks held in his name?" Ans. "No. I presume he always had a lien against the stocks, but I don't think when we opened the account, the value of the stock had much to do with it."

This remark of the defendant, if it were all that was said, might afford support to the assumption of the decision. But it was not. He had already stated just prior to the answer quoted, "My idea was that he took my personal credit;" but on his attention being called to his *lapsus lingue*, that he presumed the plaintiff had a lien on the stocks, he explained as follows:

"My understanding was, the stocks were bought *out and out for me;* if the stocks were not good for it, *I assumed to be good myself*, when the account was started, and *I was good—I was solvent.* I understood *these stocks were no more security than my personal credit, or any other property I had was security.* (Pages 19 20 record.)

Now we insist that to take an advantage of a mere verbal slip of the tongue, perpetrated by a layman in giving his testimony, to draw an inference that he admitted that the stocks were

held as security by the plaintiff, might be tolerated in the argument of an attorney, but is scarcely to be expected of a court.

The defendant from the beginning of the controversy combatted the pretense that the plaintiff had any interest in, or control over, these stocks. The novel doctrine, that if a man borrows money, and then employs the loaner, as an agent, to invest it, the latter acquires a special interest in the property which will authorize him to sell it, in order to pay the debt due him, had not yet dawned on the defendant. He supposed that *his credit* with the plaintiff did depend somewhat on the property in which these loans had been invested, and *that fact* he acknowledged in a manly way; but he denied utterly, in every variety of form that it was put to him, that there was any "agreement," formal or literal, or any understanding, that these stocks were incumbered by any "lien" of the plaintiff whatever.

He says that on one occasion the plaintiff sold some stock for him without any order to do so, and he says, "I repudiated the sale when notified of it, because *I did not propose to establish any precedent to sell stocks without my order.*"

If it was "the agreement," and understanding that the plaintiff should have a special property in these stocks, why was it, that the defendant so promptly repudiated the only instance of its assertion, and on handing back the statement of the sale to the plaintiff made the remark: "*When I want stock sold I'll give you an order.*"

When the plaintiff replied it "was a good sale," the defendant responded, "*I don't care whether it is good or bad, when I want any stocks sold I will tell you.*" (See Record page 12.) The plaintiff does not deny this, and in the light of it, perversion cannot go further than it has, in saying he "admitted these stocks were held as security." But aside from assuming to pass upon and determine these facts in issue in the manner which we have taken the liberty to criticise, there is an error in the decision which is perpetuated in that of the referee, and therefore reviewable here, which in this connection we wish to note. In the same paragraph on page 61 of the decision, it is observed: "It is apparent beyond controversy that upon the purchase of stock for the defendant by the plaintiff with his own money,

credit was given upon the stocks held for the defendant by the plaintiff, and *as a conclusion of law* the plaintiff had a special property in the stocks purchased by him with his own money, the title to which was made to himself, with the knowledge, and without objection of defendant and therefore with his acquiescence, that he held them as security for the money advanced," etc.

The distortion of the evidence in this quotation we have already remarked upon, we come to its statement of law.

We deny that the advance of money by A to B, and the purchase of property by A, under the orders of B with this money gives to A a lien or security on the property purchased, or any "special property" in it, as a "conclusion of law" from the transaction or in any form. If such were the law, a whole class of special contracts, providing security in cases of the the kind now in controversy, would be swept away. A party by being simply intrusted as an agent to make an investment for one indebted to him would acquire an interest, "a special property" in the investment. Such a method of procuring security would astonish the business world, as much as the assertion of it did the defendant in this case. If it added anything to the strength of the claim of a "special property" that the agent should, when ordered to buy or invest, be careful to do it in his "his own name," he would not probably neglect so simple a method of getting security.

It is not apparent, as asserted by the decision, that the plaintiff purchased stock with his "own money" for the defendant. His accounts in this record show that he advanced or loaned money to defendant, charged him with it as he did any other customer at his bank, and then used the money, *as ordered*, to buy the stocks. It is not "apparent" that the credit for the loan was given on the stocks purchased, but was given on defendant's general credit, as a man of means and personal responsibility. If a banker is going to use his "own money" in speculating in stocks, it is not likely he would buy stocks on the dictation of some one else, and sell them in the same way. Transactions on a "margin" to be put up and kept good, made by a broker with his customer bear no analogy to a case of this

kind, when "margins" were never spoken of, or thought of, between the parties. (Galigher's testimony, page 19 Record.) The circumstance that the purchase was made in plaintiff's own name is, as already observed in this brief, of no consequence. It is directly proved that *the defendant did not know* that fact, and as the custom is universal to carry mining stock in the name of some trustee or broker in San Francisco, the probability is that the actual certificates of stock never, in a single instance, were in the name of either of these parties. A credit of so much stock with a San Francisco broker, is, no doubt, all that ever existed. This was equivalent to the stock for all purposes of dealing, and was, no doubt, what is meant by having "title in plaintiff's own name."

Now if, as a conclusion of law, the advance of money to purchase stocks, by one directed by the borrower to do so, gives a lien on the stocks, or a special property in them, why is it that the broker invariably makes a contract, that in a certain event, the non-payment of a certain percentage or margin, he may exercise the power of sale and apply the proceeds? The defendant in this case testified, and it was not denied by the plaintiff, that with some of his customers he made written contracts, called by him "iron clad" to the effect, that on a failure to keep the "margin good" he could close out stock. (Galigher's testimony, page 19, record.) The man of credit sufficient to purchase without giving his broker any margin at all, is worse off than he who can only raise ten per cent. of the value of the stock purchased. If the law implies a power to sell, *without a contract* authorizing it, why stipulate for it? This sort of vendor's lien, which can be foreclosed without process and without notice, is a creation of the Utah Supreme Court, as anomalous in the law, as it is novel in business. It would destroy all such business done upon credit at a blow. The injury done the defendant in this single instance is an example of the ruin it would cause. In refusing to sell the "Alta," "Justice" and "Tip-top" stocks as directed, and in selling them subsequently without notice or orders, he damaged this defendant in a single week, to nearly twice the amount of his alleged advances. Controlled by the fear, which was born of his ignorance of the situation,

he at one blow damaged the defendant at least eight thousand dollars, and the Supreme Court of Utah held, that instead of making good this wrong, he may recover for a loss which he himself inflicted on the other party.

No lien in such cases is implied by the law.

Danforth vs. Prate, 42 Me. 50.
Legg vs. Willard, 17 Pick. 140.
Jarvis vs. Rogers, 15 Mass. 389.
Covell vs. Lond, 135 Mass. 44.
Randall vs. Brown, 2 How. 406.
Chandler vs. Belden, 18 Johns 157.

These authorities show, not only that possession is necessary to create or maintain a lien, but where there is any agreement made, or act done, inconsistent with its existence, such as an agreement to hold and sell as ordered, or any understanding for acred it, or to hold for a distinct purpose, the lien does not exist.

There is no analogy between this case and the case cited by the Supreme Court of Utah (Brown vs. McGraw, 14 Pet. 479). The facts are so different that to remark on the distinction would be a waste of time.

It is unlike the case of Covell vs. Lond (135 Mass. 44). There the broker *agreed* on the payment of a margin *to purchase certain stock in his own name*, and carry it, the other party keeping the margin good, until paid for, and then deliver to the customer. On a failure to keep up the margin the broker sold without notice.

The court held the arrangement amounted only to an executory contract, and that the customer having failed to keep up the margin, the broker was, and the customer was not, the owner of the stock, and refused to allow the latter to recover damages on account of a rise which took place after the sale, without notice by the broker, of the stock.

This case is unlike the New York cases.

Markham vs. Jaudon, 41 N. Y.
Carson vs. Thompson, 86 N. Y. 418.
Greenman vs. Smith, 81 N. Y. 25.

Cited in Couldbrook on Collateral Securities at Section 306.

These cases hold that a purchase through a broker on a "*margin*," to be kept good with a view to future sales *was a purchase of the stock* by the party, and made him the owner, and that if the broker, in whose hands they were left, sold them on default of "margin," he must *still give notice*, or he would be liable for a conversion of the stock. In none of the cases is the monstrous pretension asserted, that because one party loans the other money to make the purchase, without a contract for security, or an authority to sell given directly, the agent may dispose of the property without notice, on the theory of a lien in his favor. The New York cases assert the doctrine, that when the contract is express to keep the "margin" good, still a reasonable notice of the default and the intention to sell the stock is required, and that if on default a sale is made without such notice, it is a conversion of the stock. We think no support can anywhere be found in the books for the doctrine of an implied lien in such a case as this, and a right to foreclose it by a sale without any notice whatever.

We have assigned error that the referee found that the sums claimed by the plaintiff were admitted to be due subject to their being reduced by the counter-claims.

Something like this was said in the decision of the Utah Supreme Court on the motion for new trial, and the error of the referee was the result of following the error of his superiors.

The denial of the indebtedness put the plaintiff to his proof of his cause of action, and before judgment could be entered in his favor, the issue must have been found *as a fact*. To announce as "a conclusion of law" that which required to be found as a fact, is not enough to support a judgment.

Fisch vs. Caler, 21 Cal., 74.
Daveney vs. Eggenhoff, 43 Cal., 397.

The rule is fully recognized by the Supreme Court of Utah.
Burnham vs. Call, 2 Utah, 433.

With a somewhat singular misapprehension of the facts in this case, the Supreme Court in passing on it in the first appeal,

(page 59, 3 Utah) say: "the defendant admits that the sum sued for is a correct statement of the account which would be due the plaintiff were it not for the counter-claims alleged in the answer." Following this utterance the referee finds a "conclusion of law" that the sum of $6,332.30, "would be due the plaintiff with interest as in the complaint alleged, were it not for the counter-claims set up in said answer." The direct denial of this indebtedness in the answer was before the referee at the time, as it was on the first trial. The admission referred to, is in that portion of the answer setting up the new matter and counter-claim, and is in language that must be treated as a legal conclusion and in no way qualifies the denial specifically made in direct response to the allegations of the complaint. This attempt to pervert the pleadings from their true meaning, and secure an advantage "by admission," is of the same practice adopted in claiming that the defendant by using an unguarded expression in his testimony—afterwards fully explained—admitted that the understanding between the parties was that plaintiff had a lien on the stocks for advances. Parties are not to be entrapped in that way and their rights sacrificed by any such flippant assumptions. The pretended admission seized upon so eagerly, is contained in a separate defense, and will not countervail a denial in the answer directly to the allegation of the complaint.

Billings vs. Drew, 52 Cal., 565.
Siter vs. Jewett, " 92.
Nudd vs. Thompson, 24 Cal., 39.

To conclude: Without further notice of the other errors assigned:

It seems to us that this case is simple in its elements and easy of solution. There was nothing difficult or embarrassing in it till the Utah Supreme Court in its intermediate decision, sending the case back for a new trial, complicated it by assuming to pass on questions of fact, in order to lay the foundation of certain rulings as to the law. This led the referee to endeavor to conform his findings to the intimations of the court, though those questions were not submitted to it, and it could not con-

trol the findings of the proper tribunal (jury or referee) if they had been. That court could determine what would constitute the relation of principal and agent, but it could not determine whether the relation existed in this case without a finding of facts. It might define what would constitute an "implied contract," or a "lien," but whether there was one or the other in this case it could not determine without findings of fact. The facts had to be found by the proper tribunal, and the law could then be applied.

Much of the referee's report is taken up with argument, reasoning and explanations, all of which were the result of the embarrassing position he occupied by reason of the decision which preceded his connection with the case. It was contended by the plaintiff's counsel in the hearing upon which ment was affirmed that findings such as we contend necessary, because the Supreme Court had passed on the facts, and the referee could only follow the conclusions of fact, indicated in that decision. If it were true that the case was determined on the facts, as well as the law, the necessity for a new trial could hardly be perceived, and if in giving its views of the law, the Supreme Court went out of its line of duty to determine matters of fact, it is only charitable to assume it was done inadvertently and with no purpose to control the result at the next trial which was ordered. If the Supreme Court of Utah had the right to make the determination it did make, then it must follow, that this court will revise it, if erroneous. That it did mistake both the law and the facts we are confident has been shown, both in the errors of the decision on the first appeal, and in their perpetuation in the judgment from which this appeal is taken.

The other assignments we submit without further remark—they are so similar to those already argued, that they do not require separate treatment in this brief.

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For Appellant.

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APPELLEE'S BRIEF.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

WILLIAM G. GALIGHER, APPELLANT,

vs.

THOMAS R. JONES, APPELLEE,

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

C. W. BENNETT,
ATTORNEY FOR APPELLEE.

JNO. R. McBRIDE,
ATTORNEY FOR APPELLANT.

Star Print, Salt Lake.

Supreme Court of the United States.

No. 340.

OCTOBER TERM, 1887.

WILLIAM G. GALLIGHER,
Appellant,
vs.
THOMAS R. JONES,
Appellee.

APPELLEE'S BRIEF.

This case, on appeal from the first judgment in favor of appellant, is reported 3d Utah, p. 54. The decision of the same court, affirming this judgment, is not in any published report, and it is said no opinion has been filed. Exhibit "A," record pages 9 to 33 inclusive, is the evidence taken on the first trial, forms part of the referee's report, and in the record should have followed the referee's signature on page 8.

No motion for a new trial, or request for further findings or exception to the findings was made in the trial court, but the appeal to the Supreme Court of Utah was taken from the judgment entered on the report of the referee (record page 8) and the assignment of errors for the Utah Supreme Court (p. 31-32) is the first objection to the findings.

The order of the assignments of error in this court, (record p. 36 to 38) will be followed.

I.

The first assignment specifies that the legal relations between the parties, and whether or not they were those of principal and agent, are not found.

The first four findings of fact seem to answer this objection. The appellee, whether as banker or broker, exercised powers and occupied a position which included an agency and even more than a factorage; he bought the stocks with his own money, held the title and possession, and there was no right of possession in the appellant, until he paid his account and demanded the stocks. The appellant only had an interest in the business depending on his performance of the contract.

Appellee was practically pledgee, if such a relation can be based on a case where the assumed pledgor never had and never expected to have the legal title.

Markham vs. Jaudon, 41 N. Y. 235.

This case is followed by many cases in that State, but the dissenting opinion of Grover J. (p. 246) holding the appellant's interest is merely a contract relation respecting losses and profits, with no interest as owner, seems good reasoning and supported by legal analogies, and such seems to be the view implied in 135th Mass. p. 41.

II.

The second assignment of error is that the referee has not found the *precise time* when North Bonanza stock advanced to $5.50 per share. The finding is as specific as the proof. The whole question concerning North Bonanza turns on appellant's telegram November 13 (defendant's exhibit No. 1, p. 24). Appellee answered by letter the same day (exhibit 5, p. 25) and appellant received the letter the 15th, as is shown by his letter (exhibit 8, p. 29), and by what he calls his compromise telegram (exhibit No.

6, p. 25). Appellant in his testimony (p. 12) says the rise was within the next two days, and that stocks could be bought from Virginia City in one day, and sometimes in an hour. As he was notified on the 15th that Jones would not buy, he could have bought before the rise. This assignment of error is incorrect in stating the rise was before the 15th. But beside all other answers, the whole matter was immaterial to the case, because the appellee could treat the demand to exchange his securities as a mere impertinence.

III.

The third assignment specifies details in which the findings are supposed to be defective, all based on a non-compliance with the telegram to buy "North Bonanza." The telegram gives appellee no information on which he could base an opinion as to the propriety of the purchase. It gives no statement as to developments in the mine or any reason for expecting a rise in the stock or that there was any haste required. It makes a demand for the change, without assigning any reason. Appellee regarded the stock as a wild-cat, (Exhibit 5, p. 25) and the referee's report (twelfth finding, p. 5) shows such was the fact, and the temporary rise was a speculative manipulation of the market. Appellant in his letter of the 13th (Ex. 7, p. 29) gives more details, and he could not expect Jones to act without some such information. This letter is erroneously dated 18th in the record. It appears to be urged that appellee should have answered by telegram. Appellant had baited his demand with a suggestion that he might give twenty-five shares of Mexican as further security, but he could not expect appellee to act according to his wish, until he had arranged this, and to this appellee answered by telegram. It appears the whole business between the parties had been done personally at Salt Lake City, and each transaction was a matter for negotiation. There had been no custom of the parties, and was no general custom of the business, requiring appellee to negotiate by telegram, especially when not notified there was any reason for haste, and when an answer by

telegram was not asked. It was the custom to buy and sell stocks in San Francisco by telegram, and those were charged to the account, but there was no obligation on appellee to pay telegrams, or authority to charge them to the account, in negotiations for extending or changing the business. And the assignment of error is a mistake. The eleventh finding (p. 5) specifically covers the main objection.

As only questions of law are before this court, and the trial court was given no opportunity to review the facts, it is believed all the assignments of error in conclusions drawn from the testimony, or omissions based on the testimony are immaterial.

IV.

This specifies the referee erred in assuming the indebtedness, subject only to counter-claims, was admitted.

This point should have been raised in the trial court, but whenever raised it is fully answered by the pleadings. The complaint alleged as facts:

The advance of moneys to defendant's use at his request;

That certain commissions were earned;

An agreement for interest on monthly balances, and that the sum named was unpaid. It also alleged the sum named was due, but this was a conclusion which could have been omitted.

The answer denied no fact alleged. It denied there was "due or owing" any sum. This was only denying the conclusion, and was clearly made as a basis for the counter-claims. It was an admission the money was advanced, etc., but a denial it was due because defendant had counter-claims to meet it.

Pomeroy's Remedies, Secs. 578 and 637.
23 Cal., 338.
21 Cal., 216.
9 Nev., 342.

Appellant did not leave his meaning in doubt. After setting up his counter-claims, he adds the final paragraph, (bottom p. 3) which is a distinct admission.

V.

This specifies there are no facts found to support the conclusion that there was an implied agreement for a lien. Under the first, second and fourth findings, (p. 5,) the appellee was at least pledgee. The first finding shows appellee was a banker, and hence would have a banker's lien.

1st Howard U. S., 235.
Morse on Banking, 42.

As a banker or factor he would have a lien.
Dunlap's Paley on Agency, 128 and 129.

It seems hardly necessary to find there is a lien in behalf of one who buys with his own money and holds the legal title and possession, but if the finding is not strong enough in favor of appellee the appellant is not injured.

VI.

This specifies the referee erred in finding the Utah court had established the law of the case in regard to the telegram. The referree correctly recited the judgment of the court.

3d Utah, p. 54.

It is immaterial that it is not the court of last resort. Until the judgment is reversed or overruled by a higher court it is binding on the referee.

The assignment further specifies the decision is against law.

In view of the findings of fact, including the ninth finding, this question cannot be a serious one. There was no agreement for any definite extent of dealing. Each transaction was a new one and either party could retire at any time. If appellee was obliged to extend the dealings on a mere demand, he was at the mercy and discretion of appellant, who could deal desperately and recklessly in the hope of retrieving his losses The letter was all the answer that diligence or business courtesy required

to such a demand. The damages appellant supposes he has sustained, in view of the twelfth finding, are wholly imaginary.

Blake vs. Drake, 53 N. Y., 211.

VII.

This assignment refers to the finding on p. 7, and seems to have a double view. That the indebtedness is not admitted, hence there was none. This branch has been answered. Second, that if the indebtedness is admitted, there is no admission or evidence of an indebtedness *at that particular time.* This last objection can only be raised by an examination of the evidence and as this court assumes the finding supported and does not examine the evidence, the objection seems without merit. It is equally without merit on the evidence. The sales referred to in the finding were made November 27th and 29th. The complaint alleges the advances were prior to January 15th of the next year, only leaving about one and a half months between the dates, and the whole testimony and correspondence shows there was but little change in the account during that time. The ninth finding (page 5) shows the indebtedness existed November 13th, only fourteen days before the sales referred to, and on page 26 there are all the monthly balances, including the amount November 1, and toward the bottom of the same page is given *all the transactions for November*, thus specifically meeting this objection.

VIII.

This assignment is to the "sixth" conclusion of law and there does not appear to be any such conclusion in the record.

Since noticing these assignments of error a copy of appellant's brief has been received, in which only a few of the alleged errors are argued, and the first decision of the Supreme Court of this Territory is criticised. On looking at the decision it will be seen its force and scope is misapprehended in the criticisms. The trial judge had held Jones was bound to obey the telegram of November 13th, requiring him to sell

securities he had and take others. The Supreme Court held he could not be forced to do this, and that the telegram was not divisible and could not be treated as a mere order to sell. If it could have been treated as an order to sell and credit the proceeds, Jones would have willingly complied, for that was what he was urging Galigher to do. The Supreme Court has not attempted to find or settle any fact or facts, and counsel for appellee have never consciously claimed that decision could be taken as a finding of facts, but that its force is to hold the legal effect of the telegram to which the trial judge had applied a most uncommon law, and thus enabled the appellant to recover damages as the effect of his erroneous ruling. It may further be noticed that appellee has never claimed the right to sell without an order for sale. When appellant declined to order sales, appellee made some sales at his own risk, and for one so made, when it turned out the stock went higher, the referee gave ample damages.

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